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PREME COURT, U. S.

No. 75-149

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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NO.

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
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Petitioner,

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TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Fourth District Court of Appeal of the State of Florida entered on July 19, 1974.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of the State of Florida is reported at 298 So.2d 443 and is

printed in Appendix A hereto. (App. 1a) The decision is a *per curiam* opinion which incorporates by reference the authority and reasoning of the same court's decision in *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.*, also filed July 19, 1974, reported at 298 So.2d 439, and printed in Appendix B hereto. (App. 3a) The order of the Fourth District Court of Appeal denying petitioner's petition for rehearing (not reported) and the orders of the Florida Supreme Court denying petitioner's petitions for a writ of certiorari (reported at 311 So.2d 113) and for rehearing (not reported) are printed in Appendix C hereto. (App. 10a) The trial court opinion of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, is unreported and is printed in Appendix D hereto. (App. 13a) The opinion of the Florida Supreme Court in a related case, *Town of Palm Beach* v. *Gradison*, is reported at 296 So.2d 473 and is printed in Appendix E hereto. (App. 21a)

JURISDICTION

The judgment of the Fourth District Court of Appeal of the State of Florida was entered on July 19, 1974. Petitioner's petition for rehearing in that court was denied on August 28, 1974. Petitioner's petition for certiorari in the Florida Supreme Court was denied on March 14, 1975, and its petition for rehearing in that court was denied on April 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether, in a case raising federal questions in a state court, petitioner has been denied due process of law by a state court decision which applies state procedural rules and state doctrines of mootness so as to make it impossible for petitioner to obtain a final judicial determination of its federal rights in the state courts.

   A. Whether state procedural law may, consistently with federal due process, be interpreted to defeat petitioner's right to assert and protect its federal rights in the state courts.

   B. Whether state procedural rules which abridge petitioner's First Amendment right to petition the Government for a redress of grievances are consistent with federal due process.

2. Whether state procedural rules may, consistently with the federal equal protection clause, impose special burdens on petitioner in its attempt to sue a Florida municipality in the courts of Florida which are not imposed on litigants suing private parties in those courts.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

First, Fifth and Fourteenth Amendments of the United States Constitution, set forth in Appendix F. (App. 40a)

Rule 5.12, Florida Appellate Rules, set forth in Appendix F. (App. 42a)

STATEMENT OF THE CASE

Athough this action began in the state courts of Florida as a zoning lawsuit, this petition does not present any of the substantive zoning issues which originally prompted the litigation. Rather, the issues here presented for review all involve the basic question of petitioner's right to assert and protect its federal constitutional rights in an effective manner in the state courts of Florida.

Petitioner has for many years owned three substantial parcels of oceanfront property in the respondent Town of Palm Beach, Florida. For nearly 15 years prior to 1970, these properties had been zoned to permit the development of approximately 55 dwelling units per acre in buildings no more than 8 stories high. In March, 1970 the respondent Town adopted a new zoning ordinance, Ordinance 3-70, which had the effect of severely "downzoning" petitioner's properties. Under the 1970 ordinance, petitioner's largest parcel was zoned to permit no more than four single family houses per acre. Petitioner's two other, smaller parcels were zoned to permit no more than 18 units per acre in buildings no more than 3 stories high. Several miles of oceanfront property held by other owners were similarly downzoned by Ordinance 3-70.

Proceedings in the Trial Court

On July 27, 1970, petitioner filed a complaint in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County,[1] alleging, in essence, that the respon-

[1] In addition to the Town of Palm Beach, the other respondents are Claude D. Reese, James E. Hollingsworth, George G. Matthews, Robert M. Grace, Edgar H. Latham, Jr., and Yvelyne de M. Marix, constituting the Town Council of the Town of Palm Beach, Florida, and Hugh D. Bruce, as Town Clerk of the Town of Palm Beach, Florida.

dent Town's Ordinance 3-70 violated its federal due process and equal protection rights and took its property without compensation. In addition, the complaint alleged several state constitutional and statutory grounds, including an allegation that Ordinance 3-70 was adopted in violation of the Florida Government-in-the-Sunshine Law, Fla. Stat. §286.011, an act requiring public bodies to deliberate in public. Several other property owners filed similar actions at about the same time.

The Sunshine Law claim was consolidated with similar claims of other property owners and severed for separate trial. On November 30, 1971, the trial court ruled in favor of the respondent Town on that issue. *IDS Properties, Inc.* v. *Town of Palm Beach*, No. 70C 1008 (not reported). An interlocutory appeal of this decision was taken by another property owner. Petitioner did not join in the interlocutory appeal but rather elected to go forward with the trial on the federal and state constitutional issues.

On April 27, 1972, the Florida trial court, after hearing the evidence, found that petitioner had sustained the heavy burden of proving its constitutional claims and held that Ordinance 3-70 was invalid as it applied to petitioner's three parcels. The trial court went further, however, and, based on the evidence before it, found that any attempt by the Town to limit the use of petitioner's property to less than 40 units per acre and 5-story buildings would also violate petitioner's federal constitutional rights. The trial court decree expressly directed the Town to rezone petitioner's parcels to a classification that would permit such development and prohibited rezoning to any more restrictive classification. (App. 20a)

Proceedings in the Florida District Court of Appeal and Supreme Court

The respondent Town appealed the aforesaid order. Under Rule 5.12, Florida Appellate Rules (App. 42a), this appeal by a political subdivision of the State perfected an automatic stay of the trial court decree. Petitioner filed a cross-appeal on the Sunshine Law issue.

On May 30, 1973, having consolidated petitioner's cross-appeal with the earlier-filed interlocutory appeal on the Sunshine Law issue, Florida's Fourth District Court of Appeal reversed the trial court and declared Ordinance 3-70 void for violation of the Sunshine Law. *IDS Properties, Inc.* v. *Town of Palm Beach*, 279 So.2d 353. The Town appealed this Sunshine Law decision to the Florida Supreme Court, again invoking the Rule 5.12 supersedeas.

At this juncture, the Town, acting under the protection of the automatic stay granted by the Florida Appellate Rules, adopted a new zoning ordinance, Ordinance 2-74, which purported again to impose on petitioner's parcels essentially the same single family and low density zoning which the trial court had found violated petitioner's federal constitutional rights.[2]

On May 1, 1974, the Florida Supreme Court sustained the District Court of Appeal on the Sunshine Law issue and held Ordinance 3-70 to be void for violation of that law. *Town of Palm Beach* v. *Gradison*, 296 So.2d 473. (App. 21a)

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[2] In contrast to the floor of 40 units per acre established by the trial court decree as the limit of constitutionally permissible regulation, the ordinance permits a maximum of two single family houses per acre on petitioner's largest parcel; with special approvals, up to 10 units per acre would be permitted. On petitioner's other parcels, the ordinance permits a maximum of 16 units per acre.

On July 19, 1974, Florida's Fourth District Court of Appeal filed its opinion in the Town's appeal on the federal constitutional issues (App. 1a) and held that the Town's appeal had been mooted by the Town's adoption of Ordinance 2-74 and the Sunshine Law decision voiding Ordinance 3-70 on state procedural grounds. Having held the Town's appeal from petitioner's favorable trial court judgment moot, the District Court of Appeal in an incomprehensible ruling, *reversed* the trial court judgment establishing petitioner's federal constitutional rights. It is this decision which petitioner seeks to have reviewed by this Court.

The federal issues raised in this petition first arose with the filing of the District Court of Appeal's decision on July 19, 1974. In response to that decision, petitioner filed its "Supplement to Appellee's Petition for Rehearing and Additional Suggestion to Certify Decision to the Supreme Court," which dealt solely with the federal constitutional issues here sought to be raised. A copy is printed as Appendix G. hereto. (App. 43a) The following statement of the federal issue as presented to the Fourth District Court of Appeal is quoted from that petition:

> "If Rule 5.12 F.A.R. operates to permit a municipality to defeat the rights of a successful litigant by taking actions contrary to the Final Decree during the pendency of an appeal, is Rule 5.12 F.A.R. unconstitutional under the United States and Florida Constitutions as denying such litigant due process and equal protection?" (App. 48a)

The Florida Fourth District Court of Appeal denied petitioner's petition for rehearing without making reference to the feedral rights asserted therein. (App. 10a) Petitioner then filed its petition for a writ of certiorari in

the Supreme Court of Florida. Although denial of federal constitutional rights is not a basis for such a petition under Florida law, Rule 4.5c, Florida Appellate Rules, petitioner did raise and argue the issue. The relevant portions of the petition and the brief are printed as Appendix H hereto. (App. 49a) The Florida Supreme Court denied petitioner's petition without referring to the federal constitutional issues thus raised. (App. 11a) Petitioner's petition for rehearing was also denied without opinion. (App. 12a)

REASONS FOR GRANTING THE WRIT

This case presents basic questions concerning the right of a property owner effectively to assert and protect its federal constitutional rights in the courts of the State of Florida. A Florida trial court has found that any attempt to zone petitioner's property for less than 40 units to the acre violates petitioner's federal constitutional rights because such zoning is

> ". . . far too drastic for the needs of the Town as shown by this record, particularly when considered in juxtaposition with the confiscatory nature of the economic impact on this property, and the demonstrated absence of the need for such restrictive regulations to serve the general welfare." (App. 20a)

No Florida court has ever questioned the validity of this finding and conclusion. Nevertheless, the petitioner has been denied the benefits of the April 27, 1972 trial court decree and has been precluded from effectively asserting its federal rights by the Florida Fourth District Court of Appeal's interpretation of state procedural rules and precedents in its July 19, 1974 decision.

Review in this Court is appropriate not only because of the basic constitutional questions involved and the severe economic impact on petitioner of the state court's refusal to adjudicate petitioner's federal claim [3] but also because of the implications for the federal judiciary if state courts are not required to afford effective protection for the federal constitutional rights upon which every zoning case

[3] The trial court found as fact that petitioner had suffered a loss of close to $6 million by the adoption of the unconstitutional ordinance.

is founded. The nature of zoning disputes generally makes the state courts a more appropriate forum for such litigation. However, if those courts refuse to provide effective remedies for violations of federal rights, aggrieved property owners will increasingly find themselves compelled to bring their zoning litigation to the federal courts.[4]

I.

THE COURTS OF FLORIDA HAVE VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE, HAVE REFUSED TO PROVIDE AN EFFECTIVE STATE FORUM FOR THE ASSERTION OF FEDERAL RIGHTS AND HAVE DENIED PETITIONER'S RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES BY REFUSING TO ADJUDICATE ITS FEDERAL CONSTITUTIONAL CLAIMS.

The immediate effect of the Florida decision is to deprive petitioner of its judicially established federal constitutional rights without affording it a hearing on the merits of its federal claims.

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[4] The sort of procedural delaying tactics which threaten to defeat petitioner's federal rights in this case are not unique to the State of Florida. For an especially glaring and instructive example of how the federal constitutional rights of a property owner can be abused by a state court system which refuses to offer effective remedies against confiscatory municipal zoning regulations, see a series of reported decisions involving the Davlee Construction Corp. and the Town of Huntington, New York: *Davlee Construction Corp.* v. *Brooks*, 21 Misc.2d 137, 188 N.Y.S.2d 847 (Sup. Ct. 1959); *Davlee Construction Corp.* v. *Brooks*, 26 Misc.2d 240, 213 N.Y.S.2d 593 (Sup. Ct. 1960); *Davlee Construction Corp.* v. *Town of Huntington*, 33 Misc.2d 431, 223 N.Y.S.2d 376 (Sup. Ct. 1961), *aff'd as modified*, 16 A.D.2d 974, 230 N.Y.S.2d 506 (1962); *Davlee Construction Corp.* v. *Horn*, 16 A.D.2d 973, 230 N.Y.S.2d 504 (1962).

The practical, long-term effect of the decision is to foreclose petitioner from ever obtaining effective relief in the Florida courts for the already adjudged denial of a federal right. Under the District Court of Appeal's decision, petitioner is left with nothing but the right to relitigate, and relitigate again and again, the same federal issues which it has once litigated and won and which have never yet been reviewed by any Florida appellate court.

Under the Fourth District Court of Appeal's interpretation of Florida procedural rules and precedents, so long as the Town of Palm Beach wishes to go on appealing its trial court defeats and using the automatic supersedeas and the time thus obtained to adopt ordinance after ordinance, petitioner will never be able to secure a final state court judgment prohibiting the Town from adopting ordinances which do not meet the test of federal constitutional validity. While this process of relitigation goes on *ad infinitum*, petitioner's right to develop its property in the manner already adjudged to be its right under the federal constitution is held in abeyance.

In one of its early opinions giving content to the concept of "due process of law," this Court said:

> "Recognizing the difficulty of defining, with exactness, the phrase 'due process of law,' it is certain that these words imply conformity with natural and inherent principles of justice. . . ." *Holden* v. *Hardy*, 169 U.S. 366, 390 (1898).

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 161 (1951), said simply that "Fairness of procedure is 'due process in the primary sense.' "

Brinkerhoff-Faris Co. v. *Hill*, 281 U.S. 673 (1930) brought to this Court a state court's refusal to adjudicate

federal rights comparable to that involved here. In that case, the plaintiff followed established state procedures for challenging a state tax as violative of the equal protection clause of the federal constitution. When the case reached the Missouri Supreme Court, that court overruled several of its earlier decisions and held that the plaintiff had followed the wrong procedures and that it was now too late for it to follow what the court determined to be the correct procedure. On writ of certiorari to the Missouri Supreme Court, Mr. Justice Brandeis, speaking for a unanimous Court, reaffirmed the principle that the federal guarantee of due process extends to the judicial branch of state government, *Id.* at 680, and went on to hold:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

If this Court declines to review and reverse the decision of the Florida court, petitioner will have spent six years and hundreds of thousands of dollars in court costs, expert witness fees and legal fees challenging the ordinance adopted in 1970. Petitioner will have established that that ordinance was unconstitutional and that any ordinance which limits the development of its property to less than 40 units to the acre is equally unconstitutional. But despite that, petitioner will find itself back in the trial courts of Florida challenging a new ordinance which violates its rights in the same way as did the original rezoning. No matter how speedily the Florida trial court acts, petitioner will be faced with the prospect of another appeal by the Town. During that appeal, the Town would again be free to adopt yet another new ordinance and start the process all over

again. Petitioner's property, which has been rendered useless and unproductive for the past six years, will remain so indefinitely. State procedures which permit such results cannot stand in the face of the federal guarantee of due process.

These fundamental considerations of due process take on added importance in this case because the denial of due process is so extreme as to amount to a refusal of the state courts to adjudicate a federal claim and protect a federal right.

This Court has frequently recognized the obligation of the courts of the various states to provide an effective forum for the protection of federal rights. Mr. Justice Frankfurter summarized much of this law for the Court in *Angel* v. *Bullington*, 330 U.S. 183, 188 (1947):

> "Speaking for a unanimous court, Mr. Justice Brandeis thus expressed the subordination to the requirements of the Constitution of the power of a state to withdraw jurisdiction from its courts: 'The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.' . . . This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Of particular relevance to this case are several decisions of this Court indicating that neither state concepts of "mootness" nor general rules regarding the application of "changed law" on appeals can justify closing state

courts to federal claims or denying basic justice and due process to litigants.

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964), involved the question of whether a federal claim could be defeated under state law rules concerning mootness. In that case, this Court held that when a plaintiff is asserting federal rights in a state court,

> ". . . the question of mootness is itself a question of federal law upon which we must pronounce final judgment." *Id.* at 304.

This Court went on to hold that the appeal there had not been mooted since "the federal issues remain of operative importance to the parties. . . ." *Id.* at 306.

In the instant case, the federal issues originally raised remain unresolved and of unquestioned importance to the parties. The basic issue from the beginning has been whether the Town of Palm Beach may, consistently with petitioner's federal constitutional rights, downzone petitioner's properties so as to prohibit the development of condominium and apartment structures. The Florida trial court held that it could not. The District Court of Appeal, while refusing to consider the merits of that question, reversed the trial court decree on the basis that the controversy had been mooted by the Town's adoption, under the protection of a state-oriented automatic supersedeas, of an ordinance which continued to prohibit such development. Whatever the right of Florida courts to abdicate the judicial function to legislative contrivance when only state law questions are involved, they may not withdraw their protection from litigants asserting federal rights.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953), the defendant alleged the case was moot, asserting that it

had voluntarily stopped the objectionable practice which had given rise to the lawsuit. This Court held the case was not moot, observing that without an affirmative adjudication settling the controversy, the defendant was ". . . free to return to his old ways. . . ." In so holding, this Court quoted from its earlier opinion in *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 333 (1952):

> "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption."

In the instant case, there is nothing like a "protestation of repentance and reform" and the "probability of resumption" has become the fact of resumption. Here the Town has brazenly adopted another ordinance which has all the same vices as the ordinance which the trial court found violated petitioner's federal rights. Nor is there any way, under the decision of the Florida Fourth District Court of Appeal, for petitioner to stop the Town from continuing the reenactment process over and over again until petitioner is no longer willing or able to continue the battle to vindicate its federal rights.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 514 (1911), this Court recognized the basic inequity of such a situation and held that the mootness doctrine is applicable only where, pending appeal, something occurs without the fault of the defendant which renders it impossible, should the decision be for plaintiff, to grant effective relief. In refusing to regard an issue as moot simply because an order of the Commerce Commission giving rise to the dispute had expired, this Court said:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review . . ." *Id.* at 515.

So here, unless petitioner's rights to the zoning restrictions decreed to be reasonable by the final judgment of the Florida trial court are finally and clearly settled on appeal to the Florida appellate courts, the respondent Town will be free to adopt and repeal ordinance after ordinance, each in a slightly different manner thwarting any reasonable use of petitioner's properties.

The mootness issue was raised in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), a zoning case recently decided by this Court. This Court rejected the mootness claim, recognizing that the continuing impact of the ordinance, even if the precise impact could not be determined, gave the appeal continuing vitality. Similarly here, whether it is a 1970 or a 1974 ordinance which prohibits petitioner from makng what it has alleged and proved to be a constitutionally reasonable use of its property, the issue is the same and petitioner has a right to a final determination of its constitutional rights. If the courts of Florida permit Florida municipalities to send the petitioner back to the starting line by the simple device of repeatedly readopting zoning measures which have previously been determined to be unconstitutional, the guarantees of the Bill of Rights cease to have any meaning in Florida zoning litigation.

The Florida Fourth District Court of Appeal relied on the general rule that an appellate court must apply the law in effect when the appeal is decided. (App. 5a) That rule provides no sufficient basis for refusing to adjudicate

a federal claim. In *Bradley v. School Bd. of City of Richmond,* 416 U.S. 696 (1974), this Court recognized that the general rule must give way where necessary "to prevent manifest injustice." *Id.* at 716. Certainly, where the "injustice" rises to the level of a denial of federal due process, the general rule must give way. In *Bradley, supra,* this Court held that the question of whether a change in law pending appeal should be considered must be decided in light of (a) the nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change of law upon those rights. *Id.* at 717.

In this case, the right involved is the right to own and use property free of unconstitutional governmental interference. The impact of considering the change in law is to deny petitioner that right for at least several more years. But perhaps the most critical consideration relates to the nature of the parties. Here, the party which will benefit from the "change of law" is the government entity which created the change and which, under the decision of the state court herein, has unfettered power to create one such change after another.

The manifest injustice of finding an appeal to be mooted by a change of law when one of the parties has absolute discretion to change the law in question, seems self-evident and has been recognized by several state courts when confronted with similar municipal attempts to undermine the judicial protection of private rights from legislative encroachment. In *First National Bank of Skokie v. Village of Skokie,* 85 Ill. App.2d 326, 337, 229 N.E.2d 378, 384 (1967), the Illinois court refused to consider a new ordinance under such circumstances, saying:

> "To hold otherwise would severely weaken the judicial process when it is properly invoked to provide equitable remedy in zoning cases. By repeated eleventh-

> hour amendments to the zoning ordinance (or thirteenth-hour, as in this case), a resourceful village board could prolong litigation endlessly and utterly deprive an equity petitioner of any meaningful moment at the Chancellor's ear."

In *State ex rel. Humble Oil & Refining Co.* v. *Wahner*, 25 Wis.2d 1, 14, 15, 130 N.W.2d 304, 311, 312 (1964), the Wisconsin court said:

> "Equitable considerations bar the town from giving Humble such a fast shuffle at this late stage in the game. . . .
>
> • • •
>
> ". . . If the town's contention is upheld it would be tantamount to approving the proposition that every time a party came close to successfully challenging a town and its zoning board on its zoning actions, its gains could be legislated away by the enactment of an amendment to the ordinance. Equitable considerations . . . bar this court from giving any effect to the March 4, 1963 amendment."

By the decision of this case, the Fourth District Court of Appeal has abandoned petitioner to the untrammeled legislative whim of Florida municipalities and has effectively closed the doors of Florida's courts to the petitioner. This Court has recently considered effective access to the courts as an element of due process. In *Johnson* v. *Avery*, 393 U.S. 483 (1968), this Court held invalid a state prison rule that impeded prisoners attempting to assert habeas corpus claims, saying, ". . . it is fundamental that access of prisoners to the courts for the purpose of asserting their complaints may not be denied or obstructed." *Id.* at 485. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the *Avery* holding was extended to prisoners' civil rights actions. This Court said:

> "The right of access to the courts, upon which Avery was premised, is founded on the Due Process Clause

> and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579.

Here, the state court's decision defeats and obstructs petitioner's efforts to have its federal and state constitutional claims finally determined by the courts of Florida in a fashion as effective as the denial of legal assistance condemned in *Avery* and *Wolff*.

When, as here, a denial of due process prevents effective access to the courts, the result is a violation of the independent First Amendment right to petition the Government for a redress of grievances. This Court has expressly held that:

> "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed one aspect of the right of petition." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

In *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1963), this Court held that a state may use *neither direct nor indirect* means to bar citizens "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.* at 7.

II.

PETITIONER HAS BEEN DENIED THE EQUAL PROTECTION OF THE LAWS BY THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WHICH HAS THE EFFECT OF DISCRIMINATING AGAINST PARTIES WHO SEEK TO LITIGATE AGAINST FLORIDA MUNICIPALITIES.

The decision of the Florida Fourth District Court of Appeal accords special rights to municipalities involved in

litigation which are not accorded to other parties. For that reason, the decision imposes disadvantages upon petitioner in its attempt to sue the respondent Town which would not be imposed upon litigants suing private defendants.

The law of Florida generally applicable to supersedeas is that the trial court may, in its discretion, grant a supersedeas or stay, but only upon motion of the appellant and upon appellant giving a good and sufficient bond. Rules 5.1. *et seq.*, Florida Appellate Rules. If, upon a hearing on the appellant's motion, the appellee shows that the effect of the supersedeas would be to permit the appellant to do the things enjoined by the final decree, that alone is sufficient to warrant denial of the supersedeas. *Powell* v. *Florida Land & Improvement Co.*, 41 Fla. 494, 26 So. 700 (1899); *Hathaway* v. *Munroe*, 97 Fla. 28, 119 So. 149, 150 (1929).

The Supreme Court of Florida has held that the purpose of a supersedeas is "to preserve the subject of the litigation so that the appellate jurisdiction may be effective . . .," *Willey* v. *Hoggson Corp.*, 89 Fla. 446, 450, 105 So. 126, 128 (1925), and that where ". . . a supersedeas would in effect deny the main relief sought before a full hearing is had . . .," the supersedeas should be denied. *Hathaway* v. *Munroe*, *supra*, 97 Fla. 33, 119 So. 150.

In the case of a municipal appellant, however, the rules are different. The trial court has no discretion whatever to deny a supersedeas. The filing of a notice of appeal automatically perfects the supersedeas. Rule 5.12(1), Florida Appellate Rules. (App. 42a) No supersedeas bond need be given by the municipality unless it is expressly required by the court on motion of the appellee for good cause shown. Rule 5.12(2), Florida Appellate Rules. (App. 42a) Of

course, in an action such as this, a bond offers no protection to the appellee. The only effective protection is a denial of supersedeas or a limitation upon it to prohibit the municipality from violating the trial court decree pending appeal. That, according to the District Court of Appeal's decision in this case, is not available to an appellee in an appeal taken by a Florida municipality.

In both the Florida Fourth District Court of Appeal and the Florida Supreme Court, petitioner argued that in order to avoid this unconstitutional discrimination between litigants in cases involving municipalities and litigants in other cases, the Rule 5.12 automatic supersedeas should be interpreted to stay only the mandatory portion of the trial court's decree (which directed that petitioner's property be rezoned to a classification permitting 40 units to the acre) but that it not be effective to prevent the operation of the prohibitory aspect of the trial court's order (which prohibited the respondent Town from rezoning to any classification more restrictive than 40 units to the acre). Such an interpretation would have placed petitioner on a more equal footing with other appellees involved in Florida litigation. Despite the existence of precedent from the Third District Court of Appeal in Florida, *City of Miami* v. *Cuban Vill-age Co., Inc.*, 143 So.2d 69 (3rd Fla. D.C.A. 1962), and *City of Miami Beach* v. *Lansburgh*, 217 So.2d 348, 349, 350 (3rd Fla. D.C.A. 1969), the Fourth District Court of Appeal refused to so interpret Rule 5.12 and the Supreme Court of Florida refused to review the decision of the Fourth District Court.

CONCLUSION

For the foregoing reasons, we pray that the Petition may be granted.

Respectfully submitted,

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SUPREME COURT, U. S.

No. 75-149

FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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SORG/CHICAGO U.S.A.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA—FOURTH DISTRICT

JULY TERM, 1974

TOWN OF PALM BEACH, a Florida municipal corporation, EARL E. T. SMITH, as Mayor, ROBERT M. GRACE, GEORGE G. MATTHEWS, BENJAMIN H. OEHLERT, JR., MACK L. RITCHIE and YVELYNE de M. MARIX, as members of the Town Council, and HUGH G. BRUCE, as Town Clerk of the Town of Palm Beach, Florida,

Appellants,

v.

FIRST BANK AND TRUST CO. OF BOCA RATON, as Trustee under Trust Agreement dated March 23, 1964, and known as Trust No. T509,

Appellee.

CASE NO. 72-638

Opinion filed July 19, 1974.

Appeal from the Circuit Court for Palm Beach County; James C. Downey, Judge.

Chester Bedell of Bedell, Bedell, Dittmar, Smith & Zehmer, Jacksonville, and Burns, Middleton, Farrell & Faust, Palm Beach, for appellants.

William H. Pruitt of Fisher, Prior, Pruitt & Schulle, West Palm Beach, and Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, for appellee.

Gavin K. Letts, Palm Beach, as Amicus Curiae for appellants.

PER CURIAM.

We did this day enter our opinion and decision in the case of Town of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (4th D.C.A. Fla. op'n. filed July 19, 1974.) Its similarities are such as to render its rationale equally applicable here. Upon its authority and upon the basis of the reasoning therein contained, we reverse and remand with respectful instructions that the parties be allowed to amend their pleadings as they are advised within a reasonable length of time to be set by the trial court in its discretion. Such amendments and other pleadings as shall be appropriate shall be as prescribed by the Florida Rules of Civil Procedure. Intervention shall be permitted, if deemed proper by the trial court. Of course, if the controversy shall be abandoned, the cause shall be dismissed.

Reversed And Remanded for further proceedings consistent herewith.

WALDEN, MAGER, JJ, and FERRIS, JOHN G., Associate Judge, concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA—FOURTH DISTRICT

JULY TERM, 1974

TOWN OF PALM BEACH, a Florida municipal corporation, EARL E. T. SMITH, as Mayor, ROBERT M. GRACE, GEORGE G. MATTHEWS, BENJAMIN H. OEHLERT, JR., MACK L. RITCHIE and YVELYNE de M. MARIX, as members of the Town Council, and HUGH G. BRUCE, as Town Clerk of the Town of Palm Beach, Florida,

Appellants,

v.

ROYAL PALM BEACH HOTEL, INC., a Florida corporation,

Appellee.

CASE NO. 72-637

Opinion filed July 19, 1974.

Appeal from the Circuit Court for Palm Beach County; James C. Downey, Judge.

Chester Bedell of Bedell, Bedell, Dittmar, Smith & Zehmer, Jacksonville, and H. O. Faust of Burns, Middleton, Farrell & Faust, Palm Beach, for appellants.

H. L. Cooper, Jr., of O'Connell & Cooper, West Palm Beach, for appellee.

PER CURIAM.

This is a zoning case involving two lots owned by Plaintiff in the Town of Palm Beach.

The lots were zoned R-C under the terms of the Town's 1970 Comprehensive Zoning Ordinance No. 3-70. Plaintiff was aggrieved by the classification and sued the Town. Plaintiff charged that either the whole ordinance was void or at least it should be made less restrictive as applied to its property.

Trial was had. Judgment was entered for the Plaintiff. The Town appeals. We reverse and remand with instructions.

The judgment findings reflected much thought, analysis and a thorough acquaintance with the area. It surveyed in depth the respective uses, history, development and Ordinance No. 3-70 classifications, and interplay thereof, of many properties lying to the east, west, south and north of the two lots. The judgment concluded from the whole picture that the total plan was valid; however, the ordinance was deemed unreasonable and too restrictive as applied to the two lots. More specifically, the gravamen was:

> "It is thereupon Ordered and Adjudged that *Zoning Ordinance 3-70* is arbitrary and unreasonable as applied to Lots 31 and 32, Block F, Royal Park Addition to the Town of Palm Beach, and thus unconstitutional; that said property should be zoned no more restrictively than R-D *under Zoning Ordinance 3-70.*" (Emphasis supplied.)

The Town appealed. We duly took the issues under advisement, a condition that has continued until now.

Here we come to the critical, anomalous, unforeseen and intervening event. Opinions were entered in these cases: IDS Properties, Inc. v. Town of Palm Beach, 279 So.2d 353 (4th D.C.A. Fla. 1973); Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. op'n issued May 1, 1974). In sum, the Town's Comprehensive Zoning Ordinance No. 3-70 was

declared void in toto from its inception because of a violation of Florida's Government in the Sunshine Law. F.S. §286.11 (1971).

We are obliged to determine the current appeal in the light of current law. Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); Ingerson v. State Farm Mutual Automobile Ins. Co., 272 So.2d 862 (3d D.C.A. Fla. 1973); Van Meter v. Murphy, 287 So.2d 740 (1st D.C.A. Fla. 1973); Northeast Polk County Hosp. District v. Snively, 162 So.2d 657 (Fla. 1964); *See* Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 212, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); Fla. East Coast Ry. Co. v. Rouse, 194 So.2d 260 (Fla. 1967). And so we solicited counsel's additional advices in light of the two mentioned Sunshine Law cases. They graciously responded and we have considered their views.

The Town seeks to have the cause remanded for further trial court consideration. The Plaintiff wishes us to ignore the fact that the ordinance is and was void and to simply determine the appeal on the merits, regardless.

In passing, we recognize that when Ordinance No. 3-70 was deemed void, such finding necessarily included its repealer clauses. The previous land zonings thereby sprang back into existence. We are now advised that on March 26, 1974, the Town enacted a new Comprehensive Zoning Ordinance, No. 2-74. It is compellingly observed that this is not simply a re-enactment of the void Ordinance No. 3-70 in the sunshine.[1] Rather, its terms and zonings and

---

[1] If it had been restricted to a mere re-enactment there would be some justification for memorializing of the appealed trial court ruling in the interest of expediency. *See* Cosmopolitan Nat'l Bank v. Chicago, 27 Ill.2d 578, 190 N.W.2d 352 (1963).

classifications are new and different when compared to Ordinance No. 3-70. For instance, the zoning of Plaintiff's lots was considerably liberalized in Ordinance No. 2-74 when it was classified as C-B under a newly formed District.[2]

Under the now circumstances, which have not been litigated in the trial court, we do not officially know if the new classification would be acceptable to the Plaintiff. Neither do we know, were Plaintiff permitted to keep the benefit of the appealed judgment, if the neighboring owners affected by the new changes would be in a different position and different frame of mind at this time. It is possible they would wish to protest and intervene to be heard because of some new differential that might thereby be created. In other words, the chain of events has left a field of irresolution. We think it can only find correct solution and afford proper process across the board by a new look and new adjudication at the trial level, prosecuted by those who may be aggrieved.

Next, we observe that the action of the courts in erasing Ordinance No. 3-70 from the records was consistent with the efforts of the Plaintiff and contra to the wishes of the Town. The Town defended and sought to uphold its ordi-

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[2]As correctly observed in the Town's brief:

"Ordinance 2-74 creates a new commercial zoning district applicable to appellee's [Plaintiff] property which was not in existence at the time of the decision of the trial judge, and, of course, could not have been considered by him. Under Ordinance 3-70 appellee's property was zoned R-C with use limited to multi-family residential, eighteen dwelling units per acre. Under New Ordinance 2-74 the subject property is zoned *CB*, a classification which permits, by special exception, use of the property as a hotel with a density of 45 units per acre."

nance throughout. Thus, the action of the Town in enacting its current ordinance, No. 2-74, to fill the void was the consequence, at least as to the Town, of unforeseen and unwanted judicial action. It was in nowise occasioned by any wrongful design or effort on the part of the Town to leap-frog or circumvent the judicial process and take advantage of the Plaintiff.

Finally, we have re-examined and re-studied the appealed judgment in view of what we have said. Plainly, if we scissor out all reference to the void ordinance and its classifications, the findings and decision under review are meaningless. Further, neither the Town, nor we, could appropriately administer that judgment in the future except by ignoring the fact that Ordinance No. 3-70 has been declared illegal and void ab initio, and by ignoring the fact that at a later point in time the Plaintiff's lots and all other neighboring lands have been re-zoned, using new and different classifications and considering changed conditions. And so, even if we were to adopt the Plaintiff's suggestion earlier mentioned, it would create an awkward and unfair situation. It likely would not be harmonious with the plan of the new ordinance and the new zoning assigned to neighboring lands. Zoning can not be accomplished in a vacuum on a spot or lot by lot basis without regard to neighboring properties and a proper over-all plan and basic program. There must be correlation and harmony according to basic planning and zoning principles. F.S. 163.190 (1973).

It may be repetitious to remark, but it bears repeating, that we cannot take an old adjudication, using void, old and different criteria, and necessarily fit it into a viable, new and different zoning scheme.—It might fit, but it might not, and surely the trial court should have an opportunity to measure in the interest of those affected.

We hold that the adjudication and appealed judgment are moot. Therefore, we rest our holding and appellate decision upon the authority of Lelekis v. Liles, 240 So.2d 478 (Fla. 1970). In Lelekis a zoning ordinance was amended after the trial court had interpreted the original ordinance, but before the appeal was taken. The Supreme Court accepted the Second District's order which read in part:

> "... and it further appearing that in view of the ... Amendment of the zoning ordinance the circuit judge may well wish to reconsider the conclusions reached in the judgment appealed from, but has lost jurisdiction therefor because of this appeal, and it being otherwise in the interest of justice and expediency that the circuit judge have further opportunity to review the substances hereof in the light of existing circumstances, it is thereupon [ordered that the matter is remanded to the trial court for further proceedings]." *Id.* at 479.

We further ground our decision on the rationale expressed in Northeast Polk County Hosp. District v. Snively, *supra:*

> "Discussion of the points initially presented to us would be nothing more than mere brutem fulmen. The case in its present stage is not the one studied, discussed and decided by the chancellor and certainly we should be required to review only what he had the opportunity to consider. ...
>
> "We must decline to engage in a discussion of the case as it was, or now is, and it is our order that the cause be remanded to the chancery court for reconsideration and re-determination of issues that may be formulated in the light of the legislation of 1963."

We reverse and remand with respectful instructions that the parties be allowed to amend their pleadings as they are advised within a reasonable length of time to be

set by the trial court in its discretion. Such amendments shall be in the interest of making issues as to the zoning of Plaintiff's lots under the current zoning ordinance, No. 2-74. Such amendments and other pleadings as shall be appropriate shall be as prescribed by the Florida Rules of Civil Procedure. Intervention shall be permitted, if deemed proper by the trial court. Of course, if the controversy shall be abandoned, the cause shall be dismissed.

Reversed And Remanded for further proceedings consistent herewith.

WALDEN, CROSS and MAGER, JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA—FOURTH DISTRICT

JULY TERM, 1974

TOWN OF PALM BEACH, etc., et al.,

Appellant,

v.

FIRST BANK AND TRUST CO. OF BOCA RATON, etc.,

Appellee.

CASE NO. 72-638

August 28, 1974.

ORDERED that appellee's August 2, 1974 Petition for Rehearing and Suggestion to Certify Decision to the Supreme Court is hereby denied.

SUPREME COURT OF FLORIDA

January Term A.D. 1975

Friday, March 14, 1975

FIRST BANK AND TRUST CO. OF BOCA RATON, as Trustee under Trust Agreement dated March 23, 1964, and Known as Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH, a Florida municipal corporation, et al.,

Respondents.

CASE NO. 46,253

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

72-638

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, MCCAIN, OVERTON and ENGLAND, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

January Term, A.D. 1975

Wednesday, April 30, 1975

FIRST BANK AND TRUST CO. OF BOCA RATON, etc.,

Petitioner,

vs.

TOWN OF PALM BEACH, etc., et al.,

Respondents.

CASE NO. 46,253

On consideration of the Petition for Rehearing filed by attorneys for petitioner,

IT IS ORDERED that said petition is denied.

ADKINS, C.J., ROBERTS, MCCAIN, OVERTON and ENGLAND, JJ., concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

No. 70C 3415—Downey

FIRST BANK & TRUST COMPANY OF BOCA RATON, as Trustee,

Plaintiff,

vs.

TOWN OF PALM BEACH, etc., et al.,

Defendants.

FINAL JUDGMENT

Plaintiff filed its complaint in four counts for declaratory relief and injunction, praying that Town of Palm Beach Zoning Ordinance 3-70, adopted March 25, 1970, be declared constitutionally deficient as arbitrary and unreasonable, and unenforceable because in its passage the Town violated *286.011 FSA*, the Government in the Sunshine statute. The sunshine issue was severed, consolidated with some fourteen other cases raising said issue, and determined adversely to plaintiff on January 14, 1972.

The cause came on for trial on the other issues on January 10, 1972, and the Court heard the testimony of the parties and their witnesses, and has considered the briefs filed by counsel.

The Court finds from the evidence that the Town of Palm Beach is a unique community, residential in nature, with but a limited area of commercial land use. It is a narrow island some twelve miles long, eight-tenths of a

mile wide at its greatest width, and perhaps 500 feet at its narrowest, lying between the Atlantic Ocean and Lake Worth. It is connected to the mainland of West Palm Beach and the City of Lake Worth by four bridges, and the southern one-half of the island is serviced by only one arterial highway. The Town's population, which almost triples in the season, is older and wealthier than other communities in the county and state.

There are three parcels of property involved herein, all located toward the southern end of the island. From the central part of the island to its southern terminus, Highway A1A is the sole arterial thoroughfare. Due to the ravages of hurricane winds and the sea, in 1952 A1A (otherwise known as Ocean Boulevard) was relocated from the ocean side to the lake side of the island at a point some three miles north of the south Town limits. This point is a landmark commonly referred to as Sloan's Curve, and the record shows that it is an ideal planning and zoning line of demarcation.

In the past few years a number of multifamily high rise apartments have been constructed south of Sloan's Curve, as well as in other parts of the Town. This seems to be the trend, i.e., multifamily dwelling units rather than single family. Being a famed tourist community with such attractions as the Worth Avenue shopping area, a great deal of tourist or transient traffic is generated, and traffic is already a problem in the Town, which has no transit system serving the south end thereof. Although there is no evidence of an impending crisis in either area, the Town is dependent upon neighboring communities for water and sewage disposal. The trend of population movement is northward from Dade and Broward Counties, and the citizens of Palm Beach, to put it mildly, are seriously concerned over a duplication here of the development there.

Recognizing its geographical limitations, the northward migration of people from Dade and Broward Counties, the authoritative population estimates ranking Florida third in the nation in the next 28 years, and desiring to perpetuate the beauty, tranquility and other environmental virtues which have made it an internationally famous resort, in March 1970 the Town adopted a Comprehensive Plan and Zoning ordinance to accomplish orderly, controlled growth patterns consistent with what the city fathers envisioned was in the best interests of the Town and its citizens to promote the general welfare. The evidence shows the plan and zoning ordinance were well received in the community with 90% of the 1200 communications received by the Town being favorable. The plaintiff testily refers to this as "the reach of the police power is to be determined by a show of hands". While this sort of evidence will not win the day, the Court in *Gautier* v. *Town of Jupiter Island,* 142 So. 2d 321, noted such testimony with interest, and surely the wishes of the people in a community should have some serious bearing upon the end result. *Gignoux* v. *Village of Kings Point,* 99 NYS 2d 280.

Plaintiff has made a vigorous attack upon the entire Comprehensive Plan and Ordinance with a very impressive array of expert witnesses. And while the assault on parts of the plan and ordinance reflects error in some basic facts and conclusions, on the whole, looking at the reasons, purposes and goals precipitating the plan and ordinance, the Court finds they should not be declared invalid in their entirety as plaintiff seems to suggest. No doubt some erroneous facts and conclusions appear in every plan, and surely planners of different persuasions would differ as to the degree of perfection attained in any plan. This seems to be the case here. Mr. Lewis, one of the defendants' planning experts, thought so highly of this plan

that he testified he only regretted that he was not its author. While Mr. Boucher, one of plaintiff's planning experts, testified that he was astonished, shocked and saddened by the plan and ordinance.

However, as applied to plaintiff's three parcels of property, it appears to the Court the Plan and Ordinance are unreasonably restrictive. Parcel 1 was changed from a permitted use of eight story multifamily structures under the old ordinance to single family use under Ordinance 3-70. Parcels 2 and 3 were changed from an eight story multifamily use under the old ordinance to single or two family dwellings, town or boarding houses and multifamily structures three stories or 40 feet high with a maximum of 18 dwelling units per acre, plus other restrictions having to do with setbacks, etc. All things considered, it was not unreasonable for the Town to change classifications south of Sloan's Curve to something more restrictive than the old zoning ordinance in order to reduce and control allowable densities, traffic, and plan for future development, etc. *Watson* v. *Mayflower,* 223 So. 2d 368. But on this record it seems the Town overreacted.

First of all, it must be kept in mind that this is not the usual case where one purchases property in a certain zoning classification and then because a change in classification would greatly enhance its value, he wants the municipality to change it. On the contrary, plaintiff purchased with full knowledge that the zoning permitted eight story multifamily structures. Said zoning classification had been in existence for more than sixteen years when 3-70 was adopted, and many high rise multifamily structures had been constructed. As a result, the area south of the curve is multifamily in character. Next, defendants' planners paid little or no attention to the economic impact which the new classification would have on this property. Yet,

the record shows and the Court finds the impact to be horrendous! The fair market value of Parcel 1 in March 1970 under the old zoning was opined by plaintiff's appraisers to be between $5,900,000 and $5,425,000. After Ordinance 3-70 was adopted they found the fair market value of said parcel to be between $1,375,000 and $1,130,000, a mere loss in value of roughly $4,400,000. Even the Town's expert found the market value differentiation on said parcel to be $5,000,000 under the old zoning and $2,500,000 under the new ordinance. As if that weren't enough, plaintiff's economist confirmed that from an economic approach the loss was virtually the same. He found it was impossible for the owner to prevent a substantial loss should he choose to develop the parcel under present restrictions.

Somewhat less dramatic, but still significant, is the loss on Parcels 2 and 3. Plaintiff's experts show Parcel 2 diminishing in market value from about $4,000,000 to about $2,200,000, a loss of about $1,800,000! Defendant found only a $175,000 loss. On Parcel 3 plaintiff showed a diminution in value from $800,000 to $500,000, while defendant found the figures to be $720,000 to $560,000. Thus, the Court finds the aggregate loss in market value on the three parcels to be between $3,000,000 and $6,000,000, probably closer to the latter figure. While loss in market value due to a zoning change is not alone sufficient to condemn the ordinance, *Oka* v. *Cole,* 145 So. 2d 233; *City of Miami Beach* v. *8701 Collins Ave.,* 77 So. 2d 428, it is one of the factors to be considered in determining the reasonableness of the restriction imposed. *State ex rel. Skillman* v. *City of Miami,* 134 So. 541; *1 Anderson, American Law of Zoning,* pg. 91. And the loss here would certainly get one's attention!

One of the prime reasons for enacting the drastic change in the zoning for this area was the factual conclusion in

the Comprehensive Plan that "the major growth will occur south of Sloan's Curve where the winter population will increase from about 9,000 to between 40,000 and 65,000 persons." This is one of the Plan errors referred to earlier. Plaintiff's witnesses demonstrated that conclusion to be erroneous by at least 100%.

Another reason given by Alan Dresdner, of Candeub, Fleissig & Associates, the Town Planner, for the severe reduction in use was "the elimination of visual barriers", most assuredly meaning barriers to the ocean. But the dune line along the three mile stretch from Sloan's Curve to the south end of Town is about 25 feet above the grade of the road, and one driving along A1A cannot see the ocean over the dune line. When pressed on cross examination regarding this he wound up suggesting the visual subject was the horizon over the top of the dune line, trees, etc.! Yet another major premise found in the Comprehensive Plan of doubtful validity is the indicated inadequacy of public facilities, i.e., water, sewage and roads, to cope with future growth and development in the area. The rule seems to be that the well recognized presumption of the validity of a municipal zoning ordinance is substantially weakened by the absence of a comprehensive plan, *Raabe* v. *City of Walker*, 174 N.W. 2d 789, and the same principle should apply to a plan with such fundamental errors.

When you consider the questionable necessity for the drastic change in a long standing zoning classification demonstrated by the grossly erroneous population projection, the fact that the old ordinance allowing eight stories didn't freeze or even chill residential construction north of the Curve, indicating no adverse impact, the specious reason given that it would eliminate visual barriers, the proof that public facilities appear to be adequate to handle

future development in the area even under the old ordinance, and contrast that with the devastating economic impact on the property, it would appear the present restrictions are unreasonable and arbitrary. And it is a judicial function to seek to determine whether the public interest advanced by the ordinance is worth the price. *1 Anderson, American Law of Zoning*, p. 93. But there doesn't appear on this record to be any balance between the community need or general welfare on the one hand and the degree of restriction involved on the other. *Hartnett* v. *Austin*, 93 So. 2d 86; *Burritt* v. *Harris*, 172 So. 2d 820; *City of St. Petersburg* v. *Aikin*, 217 So. 2d 315. Plaintiff could improve these three parcels within permissible limits, but not reasonably within the meaning of the cases.

This record and the Court's view of the property and surrounding area, pursuant to stipulation, convinces the Court that every legitimate requirement which the Town has that would warrant this degree of restriction on plaintiff's three parcels of property can be accomplished by zoning said parcels no more restrictively than R-D under Ordinance 3-70. This would allow multifamily improvements five stories or 62 feet in height, with a maximum of 40 dwelling units per acre. And that's no Miami Beach, the specter envisioned by Town officials and the Planner during public hearings on the plan. This record shows that such improvements will not overburden the public facilities, that it will not have an unreasonably adverse impact on other property in the community, and that as a matter of fact there will probably be more open space under such conditions than there would under present zoning. This Court in another case decided this date involving seven parcels in the same area as Parcel 3, has made a similar ruling requiring the rezoning of said parcels not more restrictively than R-D under Ordinance 3-70.

The Court is quite aware that zoning is a legislative function and that courts should be reluctant to interfere; that the municipality's product is presumed valid, and if the question is fairly debatable, the court should refrain from striking it down. But the validity of these classifications is not fairly debatable as applied to this property. Palm Beach is a beautiful place and it would be nice to preserve it just as is—raise the bridges, declare a moratorium on any further construction or increase in population, and live happily ever after—the Chinese Wall theory, as plaintiff characterizes it. But of course the constitution enjons such arbitrary action by the municipality as a taking of private property without due process. Here, of course, the restriction was not that drastic, but in the Court's judgment it was far too drastic for the needs of the Town as shown by this record, particularly when considered in juxtaposition with the confiscatory nature of the economic impact on this property, and the demonstrated absence of a need for such restrictive regulations to serve the general welfare.

It is thereupon ORDERED and ADJUDGED that Ordinance 3-70 as applied to plaintiff's three parcels of property described in the complaint is unreasonable, arbitrary and unconstitutional.

It is further ORDERED and ADJUDGED that the Town of Palm Beach is directed to rezone said property to a classification no more restrictive than R-D under Ordinance 3-70.

The court costs of this cause shall be taxed against the defendant, Town of Palm Beach.

Copy furnished counsel.

Done and Ordered this April 27, 1972.

James C. Downey
Circuit Judge

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1974

TOWN OF PALM BEACH, ET AL,
Petitioners,

v. Case No. 44,099
DCA Case No. 72-630

JULES T. GRADISON, Respondent.

TOWN OF PALM BEACH, ET AL,
Petitioners,

v. Case No. 44,100
DCA Case No. 72-631

FRED GLADSTONE, Respondent.

TOWN OF PALM BEACH, ET AL,
Petitioners,

v. Case No. 44,101
DCA Case No. 72-632

FAIRMONT CONVERTING CO., INC, Respondent.

TOWN OF PALM BEACH, ET AL,
Petitioners,

v. Case No. 44,102
DCA Case No. 72-633

MORRIS LANSBURGH, Respondent.

TOWN OF PALM BEACH, ET AL,

Petitioners,

v. Case No. 44,103
DCA Case No. 72-634

PERRY KAYE, Respondent.

TOWN OF PALM BEACH, ET AL,

Petitioners,

v. Case No. 44,104
DCA Case No. 72-635

RALPH H. SHERE, ET AL, Respondents.

TOWN OF PALM BEACH, ET AL,

Petitioners,

v. Case No. 44,105
DCA Case No. 72-636

WALTER PORANSKI, ET UX, Respondents.

TOWN OF PALM BEACH, ET AL,

Petitioners,

v. Case No. 44,106
DCA Case No. 72-638

FIRST BANK AND TRUST CO. OF BOCA RATON, ETC., Respondents

Opinion filed May 1, 1974

Writs of Certiorari to the District Court of Appeal, Fourth District

Chester Bedell and John A. DeVault, III of Bedell, Bedell, Dittmar, Smith and Zehmer; and Burns, Middleton, Farrell and Faust, for Petitioners

H. L. Cooper, Jr. of O'Connell and Cooper, for Jules T. Gradison, Morris Lansburgh, Perry Kaye, Ralph H. Shere and Walter Poranski; Larry B. Alexander of Jones, Paine and Foster, for Fred Gladstone and Fairmont Converting Co., Inc.; and Ross, Hardies, O'Keefe, Babcock, McDugald and Parsons; and Fisher, Prior, Pruitt and Schulle, for First Bank and Trust Co. of Boca Raton, Respondents

ADKINS, C.J.

By petition for writ of certiorari, we have for review the consolidated cases arising out of a decision of the District Court of Appeal, Fourth District (*IDS Properties, Inc.* v. *Town of Palm Beach,* 279 So.2d 353), which is accompanied by a certificate of the District Court of Appeal that its decision has passed upon a question of great public interest, to-wit:

> "Whether a zoning ordinance adopted by zoning authorities and the Town Council after public hearings is rendered invalid under the § 286.011, F.S. 1971, government in the sunshine law, because of the nonpublic activities of a citizen's planning committee which committee was established by the Town Council and acting on behalf of the Council in an advisory capacity participated in the formulation of the zoning plan."

We have jurisdiction. FLA. STAT., art. V, § 3(b)(3), F.S.A.

The Town Council of the Town of Palm Beach, hereinafter referred to as "Town Council," passed a resolution providing that the Council would undertake the updating and revision of the town zoning ordinances. Interviews were held with a planning firm, hereinafter called "Planners," and, at a public meeting, the Town Council authorized a contract with the Planners. A citizens' planning commission was decided upon and chosen by the Town Council at a nonpublic administrative meeting. The nomi-

nees were told that the Town Council had nominated each one to serve on the town planning committee for the purpose of guiding the Planners in their efforts to assure that the plan produced would be consistent with the character, image and land-use controls intended by the citizens. Changes in the plan during its formulation were made by the Planners to reflect the decisions of the planning committee.

The planning committee, a lay group of citizens, were not regularly employed personnel of the Town. The members of the committee were not landscape or civil engineers nor expert vocational zoning planners performing their work outside the scope of the sunshine law. Neither were they contractors engaged by the Town for making zoning studies, surveys or plans. To the contrary, they were a buffer lay group of citizens to serve part-time as the alter egos of the Town Councilmen to make tentative decisions guiding the zoning planners and advising the Council as to their ultimate zoning ordinances. In other words, the Council delegated to the committee much of their administrative and legislative decisional zoning formulation authority which is ordinarily exercised by a city-governing body itself—and particularly the position of the process where the affected citizens expect to be officially heard. Thus, the nature of the committee and its function reached the status of a board or commission that to act legally must comply with the sunshine law.

The trial court specifically found that the Planning Advisory Committee meetings with the Planners were not open to the public, nor were minutes taken. These meetings were numerous and detailed.

At a joint meeting of the Town Council and the planning committee the role of the committee was explained. The Town Council was of the opinion the committee should

work as an "element" of the zoning commission, and further, that the Town Council had the authority to override any changes induced by the zoning commission and "would do so without timidity." This joint meeting was held without notice, without members of the public or press present, and no official minutes were taken or recorded.

Thereafter, the President of the Town Council and various members of the zoning commission met with the town manager and were finally advised as to the operation of the committee. An agenda was prepared for presentation of the tentative comprehensive plan to a meeting of the Town Council. At that meeting the plan was discussed. Further executive sessions of the zoning commission were held.

Thereafter, full public meetings and hearings of the zoning commission and of the Town Council were conducted and proper procedure followed. The comprehensive zoning plan was approved in essentially the same form as that which had been produced by the consultants and the planning advisory committee.

The government in the sunshine law contains the following:

> "(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting." FLA. STAT. § 286.011, F.S.A.

The only question to be determined is whether the citizens planning commission composed of private citizens, which was established by the Town Council and the mem-

bers thereof appointed by the Town Council, was subject to the government in the sunshine law.

Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. The ordinary taxpayer can no longer be led blindly down the path of government, for the news media, by constantly reporting community affairs, has made the taxpayer aware of governmental problems. Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.

Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.

Those who do not attend public meetings are given ample opportunity to participate in government by securing information of governmental activities from the news media. Responsible reporting of governmental activities results in letters or telephone calls from interested citizens so that government officials are given the benefit of both sides of the question. No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any governmental problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate

in governmental activities, the decision-making process will be improved.

Few, if any, governmental boards or agencies deliberately attempt to circumvent the government in the sunshine law. We feel that the Town Council of Palm Beach acted in good faith, but any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of the government in the sunshine law.

The citizens' planning committee was not an organization formed by any civic group such as a taxpayer's league, better government league, civic association, etc. It was conceived and formed by the Town Council for the purpose of working with the planning consultant so that the plan produced would be consistent with the land-use controls intended by the citizens. The citizens' planning committee was an arm of the Town Council.

The Legislature would have no right to require meetings of civic organizations, unconnected with municipal government, to conform to the government in the sunshine law. However, a subordinate group or committee selected by the governmental authorities should not feel free to meet in private. The preponderant interest of allowing the public to participate in the conception of a proposed zoning ordinance is sufficient to justify the inclusion of this selected subordinate group, within the provisions of the government in the sunshine law.

Cases from other jurisdictions dealing with the scope of similar statutes compel the conclusion that bodies such as the Palm Beach Planning Committee selected by the Town Council are governed by FLA. STAT. § 286.011, F.S.A.

In *Raton Public Service Co.* v. *Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966), the Board of Directors of a city-owned

electric utility were held to be within the scope of a statute governing "all other governmental boards and commissions."

In *Glick* v. *Trustees of Free Public Library,* 2 N.J. 579, 67 A.2d 463 (1949), trustees of the Library were held to be within the purview of a statute requiring the "governing body" to advertise for bids.

In the case of *Bogert* v. *Allentown Housing Authority,* 426 Pa. 151, 231 A.2d 147 (1967), the Pennsylvania Supreme Court, interpreting that State's "right to know" statute, stated:

> "Within the past several decades we have witnessed the creation of these public bodies called 'authorities' which have been granted the power to, and do, perform important governmental functions which vitally affect the public. Unlike other public bodies, the members of the 'authorities' are appointed and not elected and are not *directly* responsible for their actions to the electorate. If the elected members of public bodies are to be subjected to public disclosure of their actions, how much more important that the appointed members of public bodies be required to make such disclosure." (p. 151)

In *Beacon Journal Publishing Co.* v. *City of Akron,* 3 Ohio St.2d 191, 209 N.E.2d 399, 404 (1965), it was held that a city planning commission created by the city charter with "such other powers and duties as the council may confer upon the planning commission," was subject to the open meeting provision of the Akron City Code which applied to "any board or commission . . . created by the charter or by action of council."

In *Lhormer* v. *Bowen,* 410 Pa. 508, 188 A.2d 747, 749 (1963), a proposed rezoning ordinance was held ineffectual to restrict the issuance of a building permit, one of the

reasons being the failure of the planning commission to hold a public hearing on its preliminary report before submitting a final report to the borough council for action, as required by the zoning enabling legislation.

In *Sacramento Newspaper Guild* v. *Sacramento County Board of Supervisors,* 69 Cal.Rptr. 480, 485 (Cal.3d, 1968), California's Third District Court of Appeals upheld an injunction restraining the Sacramento County Board of Supervisors, and its committees, from holding informal meetings in violation of the Brown (California) Act. It held that there was nothing in the new Brown Act "to demarcate a narrower application than the range of governmental functions performed by the agency." It further held the Act applied not only to "action" but also to "deliberated gatherings . . . however confined to investigation and discussion." Noting the widespread evasion of pre-Brown Act open-meeting statutes "through unannounced 'sneak' meetings and through indulgence in euphemisms such as executive session, conference, caucus, study or work session, and meeting of the committee of the whole," the court concluded that the statute could be pushed "beyond debatable limits" to block such evasive techniques. The court continued:

> "An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives,

> the term 'meeting' extends to informal sessions or conferences of the board members designed for the discussion of public business." (p. 487)

One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken.

The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State. See Florida Law Review, GOVERNMENT IN THE SUNSHINE BY RUTH MAYES BARNES, Vol. XXIII, 361, 365 (Winter 1971).

Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*. *Times Publishing Co.* v. *Williams*, 222 So.2d 470 (Fla.App.2d, 1969). Florida Law Review, GOVERNMENT IN THE SUNSHINE BY RUTH MAYES BARNES, Vol. XXIII, p. 369 (Winter 1971).

Although a criminal prosecution requires proof of scienter (*Board of Public Instruction of Broward County* v. *Doran*, 224 So. 2d 693, 699 (Fla. 1969)), an unintended violation of the government in the sunshine law will negate any action taken by the Town Council. FLA. STAT. § 286.011, F.S.A.

The Superior Court of New Jersey in *Wolf* v. *Zoning Board of Adjustment of the Borough of Park Ridge,* 79 N.J.Super. 546, 192 A.2d 305 (1963), held that the proper implementation of their "Right to Know Law" requires the court upon proper application to set aside any official action taken without compliance, even in the absence of bad faith, saying:

> "The trial judge noted, and the defendant officials stress, that the act states that 'official action taken in violation of the requirements of this act shall be *voidable* (Emphasis theirs.) in a proceeding in the Superior Court,' thereby supposedly indicating a legislative intent that the voiding of such action should rest in the discretion of the judge. The court concluded that since no impropriety or bad faith on the part of the board was indicated, it should exercise its discretion to permit the action to stand. We think the court took too narrow a view of the intent and underlying policy of the statute. The purpose of the act, as reflected in N.J.S.A. 10:4-1, is to implement the declaration therein that it is 'the public policy of this State to insure the right of the citizens of this State to attend meetings of public bodies * * * for the protection of the public interest.' In other words, the object of the act is primarily prophylactic, and not necessarily restricted to creation of a remedy for illegalities at particular public meetings from which the public is excluded. Appropriate implementation of that object and policy calls, as a general rule, for the Superior Court upon proper application to set aside any official action, as defined by the act, which is taken without compliance with the prescriptions of the statute, as here. We need not now decide that no discretion is ever to be reserved to the court to save the validity of official action taken in contravention of the statute. That question may be left to await a case where a sufficiently impelling counter-interest may be argued to bespeak sustaining the action impugned. *It suffices here to say that mere absence of bad faith or*

> *other impropriety on the part of the public body should not ordinarily move the court to stay its hand in voiding official action taken contrary to the statute upon proper application therefor.*" (Emphasis supplied.) (pp. 308-309)

FLA. STAT. § 286.011(1), F.S.A., specifically provides that "no resolution, rule, regulation or formal action shall be considered binding" where the government in the sunshine law is violated. We follow the reasoning of the New Jersey court in *Wolf* v. *Zoning Board of Adjustment of the Borough of Park Ridge, supra.*

Answering the question presented by the District Court of Appeal in the case *sub judice,* we hold that the zoning ordinance adopted by the zoning authorities and the Town Council after public hearing was rendered invalid because of the nonpublic activities of citizens planning committee, which committee was established by the Town Council, active on behalf of the Council in an advisory capacity, and participated in the formulation of the zoning plan. We approve the decision of the District Court of Appeal.

Having answered the certified question, this cause is remanded to the District Court of Appeal for further proceedings in accordance with the views expressed herein.

It is so ordered.

ERVIN, BOYD and MCCAIN, JJ., Concur

DEKLE, J., Dissents with opinion

ROBERTS, J., Dissents and concurs with DEKLE, J.

DEKLE, J., dissenting:

The Town Council, upon determining that an updated zoning plan was advisable for the Town of Palm Beach, employed a professional planning firm for the purpose of preparing such a plan. In addition, the Town Manager named five citizens from a group recommended by council members to serve as guides to the professional consultants in the preparation of the comprehensive zoning plan. The crux of the problem before this Court is that this group, the Advisory Planning Committee, held its meetings without public attendance or involvement.

The plan finally proposed by the consultants was adopted, with some modifications, by the Zoning Commission and Town Council, *following public meetings and discussion.* The adoption of the plan was accordingly carried out "in the sunshine."

The controlling statutory law in this case is, of course, *Fla. Stat.* § 286.011, F.S.A., which provides:

> "(1) All *meetings of any board or commission* of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, *at which official acts are to be taken* are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.
>
> "(2) The minutes of a meeting of any *such board or commission* of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. . . .
>
> "(3) Any *person* who is a *member of a board or commission* or of any *state agency* or authority of any *county, municipal corporation* or any political sub-

division who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or 775.083." (emphasis added)

The role of the Advisory Planning Committee was well defined by the learned trial judge in a memorandum order:

> "This was an ad hoc committee of local residents familiar with the character, historical background and desired future development of the Town. It was the committee's function to transmit to the Planner that information and to advise with it so that the eventual plan would be compatible with the known desires of the community. This committee of citizens, while influential in what the Planner ultimately produced, was merely advisory as far as the Planner, the Zoning Commission and the Town Council were concerned. They made no decision which bound either the Zoning Commission or the Town Council. Much of what the Planning Committee did with the planner could have been done by the Town Manager, or some of the Town's staff, or the Planner could have sought out residents on its own initiative for advice and assistance in preparing the plan."

The trial judge concluded that the acts complained of did not fall within the purview of the Sunshine Law.

The district court of appeal reversed the trial court's finding, reasoning that the Town Council should not be able to do by proxy that which it is forbidden to do itself by *Fla. Stat.* § 286.011, F.S.A., suggesting that the Planning Committee had *de facto* authority to act on behalf of the Town Council, so that it must stand in the shoes of the Council in regard to the Government in the Sunshine Law. In the words of the district majority opinion:

> "Although, admittedly, the zoning plan was 'born' when the Town Council (acting in the sunshine) voted

> upon the ordinance at a public meeting, the 'conception', which is an inseparable part of the life-giving process, took place (in the dark) with the appointment of the Citizens' Planning Committee. The zoning ordinance was, therefore, not conceived eo instanti at the public meetings held by the Town Council and Zoning Commission. It was the product of the deliberations and actions of the Citizens' Planning Committee acting as the alter ego of the Town Council; The action of the Citizens' Planning Committee was an indispensable requisite to and integral part of the 'official acts' or 'formal action' of the Town Council." 279 So.2d 353, 356.

The question presented in the case *sub judice* is one of first impression in this State. The effect of the "Government in the Sunshine" Law has been considered in the past as it applies to various boards and commissions of elected officials, the terms used in the statute. But it has never before been suggested, by either the Courts or the Legislature, that meetings of all unofficial and purely advisory groups be likewise public and give notice of meetings held and otherwise act to insure that their meetings are "public." The statute simply does not include such persons.

Should the Legislature choose so to extend the Act, then would be the time to so hold, but not by this precipitous judicial extension thereof without the benefit of the majority's own requirement of a "marketplace of ideas" first allowed to be debated by the citizens' elected representatives in the Legislature. Let the same worthy principle be applied in both instances. "Consistency, what a jewel thou art."

The Legislature having chosen not to include such advisory and purely private groups under the mandate of the statute, the Courts are powerless to extend the statute

beyond the clear intent of the Legislature. As this Court has stated:

> "In construing or interpreting the words of a statute it should be borne in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of the act to that intent, much less, says the Maryland court, 'can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.'" *Fine* v. *Moran,* 74 Fla. 417, 77 So. 533, 536 (1917).

Despite the majority's assertion to the contrary, the extension of the statute here asserted would as logically apply also to gatherings of civic groups which meet with elected officials to discuss or recommend suggested legislation, resulting in the invalidation of otherwise quite proper "sunny" subsequent decisions by such officials because in all innocence no notice to the press and the public might have issued for the occasion. Likewise, all organizations dedicated to the swaying of public opinion and the initiation of public action later taken by a public body—be it a private group of legislative lobbyists, the League of Women Voters or the editorial board of a civic-minded publication—would have to welcome public involvement in their decision-making processes to avoid "tainting" such officials' subsequent decisions in public.

In the most recent pronouncement by this Court on the "Sunshine" issue, it was decreed that a county school board sitting in a quasi-judicial matter is still required to meet in the "Sunshine." *Canney* v. *Board of Public Instruction of Alachua County,* 278 So.2d 260 (Fla. 1973). This Court has previously held that executive sessions of school boards (*Board of Public Instruction of Broward*

County v. *Doran*, 224 So.2d 693 (Fla. 1969)), or city councils (*City of Miami Beach* v. *Berns*, 245 So.2d 38 (Fla. 1971)), must be in the "Sunshine," reasoning:

> "A secret meetings occurs when *public officials* meet at a time and place to avoid being seen or heard by the public. When at such meetings *officials* mentioned in Fla. Stat. § 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal." *City of Miami Beach* v. *Berns, supra*, at 41. (Emphasis added).

However, both cases involved meetings of officials mentioned in the statute, to-wit:

> "[A]ny board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution." *Fla. Stat.* § 286.011(1), F.S.A.

Nothing in the statute or in the prior decisions of the courts of this State dictates or even hints that the "Government in the Sunshine" Law is intended to go beyond elected or officially appointed boards. In fact, it is constitutionally questionable in light of the freedoms of speech and peaceable assembly guaranteed by the *U.S. Const., Amendment I*, and by *Fla. Const.*, art. I, §§ 4, 5, F.S.A., to forbid private citizens to meet and discuss matters of public concern merely because their ideas are to be transmitted to a firm of professional planners and consultants, and because their ideas might be incorporated into a suggested plan which might then pass muster before the public in full hearings, and before two public bodies meeting in the "Sunshine," as occurred *sub judice*. The Citizens' Planning Committee working with the professional planner here cannot, under any reasonable theory, be equated with

such a public "board or commission." These were solely private citizens, unsalaried volunteers.

In my view, the language of the statute mandates that the fact that a purely advisory group of private citizens did not hold public meetings, is not a violation of *Fla. Stat.* § 286.011, F.S.A., such as to void official action later taken in the "Sunshine" by the Zoning Commission over a period of five days of public hearings and debate and thereafter, by the City Council, after six days of public hearings at which the only decisions were made. The fact that a private advisory group provided a part of the input which resulted in the plan presented to the official bodies for consideration is at best a preliminary planning aid which is entirely subject to the will ("decisions") of the Commission and the Council (official body). It only provided a starting point from which the Commission could start to work and into which the public could inject its contentions and plans to be incorporated or substituted as the *public* body should decide. The "marketplace of ideas" occurs at that point and total input from the public is therefore not denied.

Where it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine *for the elected board what course should be pursued,* and where the actions of the private citizens are in any way *binding* upon the elected officials, a different situation would be presented. No such evidence or any indication of collusion between the Town Council and the Citizens' Planning Committee has been found in the case *sub judice.* No intentional or incidental wrongdoing or collusion has been shown. If such collusion and impropriety of purpose had been made to appear, then the hearings of

the private committee could be viewed as an alter ego extention of the official board, and thus amenable to the "Sunshine." This is not the case.

So long as the Committee has been advisory only, and the Zoning Commission and Town Council have remained free to view the suggested comprehensive plan as objectively as though it had been prepared solely by the hired consultants, and have made the decisions in the "Sunshine," the requirements of the statute have been met. See *Basset* v. *Braddock*, 262 So.2d 425 (Fla. 1972). Accordingly, the question posed by the District Court of Appeal, Fourth District, as stated, should have been answered in the negative.

I therefore most respectfully must dissent.

ROBERTS, J., Concurs

APPENDIX F

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in

each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Florida Appellate Rules:

Rule 5.12. Supersedeas Bond not Required of the State and its Political Subdivisions and Their Boards, Commissions, etc.; Security when Required

(1) When Security Not Required.—When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of the notice of appeal or the petition for certiorari as the case may be shall perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court.

(2) Court May Require Bond.—The court may, on motion for good cause shown, require a supersedeas bond or other security, in such amount, form and manner as it may prescribe as a condition for the further prosecution of the appeal or certiorari.

APPENDIX G

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

NO. 72-638

TOWN OF PALM BEACH, a Florida municipal corporation, et al.,

Appellants,

vs.

FIRST BANK AND TRUST CO. OF BOCA RATON, As Trustee Under Trust Agreement Dated March 23, 1964, And Known As Trust No. T509,

Appellee.

SUPPLEMENT TO APPELLEE'S
PETITION FOR REHEARING

and

ADDITIONAL SUGGESTION TO CERTIFY
DECISION TO THE SUPREME COURT

The Appellee respectfully submits the following additional points and authorities in support of its previously filed petition for a rehearing of the opinion and decision of the Court filed July 19, 1974:

5. The Court's opinion has the effect of validating acts done in violation of the terms of the supersedeas and thereby raises grave issues concerning the constitutional rights of litigants subject to the automatic supersedeas applicable in cases where the appellant is a municipality. Rule 5.12, F.A.R., 32 F.S.A.

City of Miami v. *Cuban Vill-age Co., Inc.,* 143 So.2d 69 (3rd Fla. D.C.A. 1962) is directly in point and, as applied to this case, compels the conclusion that the Town of Palm Beach was without authority to adopt Ordinance 2-74 during the pendency of this appeal. Accordingly, that ordinance is void *ab initio* and can provide no basis for holding this appeal to be moot.

In *Cuban Vill-age,* supra, the trial court entered a final decree "granting to the appellee affirmative relief and directing the City to issue to it certain municipal licenses." *Id.* at 69. When the City appealed, the decree was stayed by the automatic effect of the statutory predecessor of Rule 5.12. The City then attempted to arrest the appellee for conducting his business without the required licenses. The appellate court enjoined such action on the theory that the mandatory decree implied a prohibition and that the automatic statutory supersedeas was ineffective to stay the prohibitory aspect of the decree:

> "The final decree was mandatory in nature and directed the City and its officials to issue the municipal licenses sought, to the appellee, upon proper application. By implication, if in fact not by operation of law, the prohibitory features of the temporary injunction, restraining the City and its officials from arresting the appellee for not having certain municipal licenses, was merged in the final decree in that the chancellor directed that the licenses in question be issued by mandatory provisions.
>
> "By the terms of § 59.14 Fla. Stats., F.S.A., the automatic stay secured by the City, upon the filing of the notice of appeal, only stayed the execution of the final decree. This final decree being in effect a prohibition against the City interfering with the appellee's business, for not having certain municipal licenses, and mandatory in directing the City to issue

> such licenses, the operation of the automatic stay [by virtue of the provisions of § 59.14 Fla. Stat., F.S.A.] only stayed the effect of the mandatory provisions of the final decree and did not stay the prohibitory force of the decree. Although the City [pending this appeal] is not required to issue the licenses, the stay does not have the effect of vitiating the effect of the final decree in order to permit the City to arrest the appellee's agents for not having a license. It is generally held throughout the country that a supersedeas or stay of a final decree is not effective to prevent the operation of a prohibitory injunction, but is effective to stay the operation of a mandatory injunction." (Brackets by the Court.)

In the instant case the trial court's final decree directed the Town "to rezone said property to a classification no more restrictive than R-D under Ordinance 3-70." While the supersedeas relieved the Town temporarily of the duty to comply with the mandatory order to rezone, it did not authorize the Town to violate the prohibitory aspect of the decree which prevented any zoning classification "more restrictive than R-D under Ordinance 3-70" from being applied to appellee's property. While the Town did not have to rezone, when it decided to do so, it remained subject to the decree's prohibition.

Appellee has maintained throughout these proceedings that the provisions of Ordinance 2-74 could have no application to his property for the reason that any such application would violate the Final Decree. This Court's opinion has the effect of rejecting that position and holding that Ordinance 2-74 does apply to appellee's property. By direct implication, this is a holding that the Town could, with impugnity, ignore the terms of the Final Decree and the supersedeas applicable to it.

Apart from its inconsistency with the well-accepted principles of supersedeas as announced in the *Cuban Vill-age*

case, this Court's holding violates the basic tenet that a supersedeas is granted only for the purpose of maintaining the status quo. As held in *Willey* v. *Hoggson Corp.*, 105 So. 126, 128 (1925), the purpose of a supersedeas is "to preserve the subject of the litigation so that the appellate jurisdiction may be effective. . . ." Here, this Court's decision permits just the opposite and, pursuant to it, the supersedeas has permitted the defeat of the appellate jurisdiction.

In *City of Miami Beach* v. *Lansburgh*, 217 So.2d 348 (3rd Fla. D.C.A. 1969), the Third District Court of Appeal declined to construe Rule 5.12, F.A.R., 32 F.S.A., to authorize action by the City of Miami which would upset the status quo pending appeal from an order enjoining the operation of a City board:

> "[W]here the granting or denial of a supersedeas is discretionary, usually it is granted where it would operate to maintain the status quo of the property or rights constituting the subject matter of the litigation pending the appeal, but a supersedeas usually is denied where it appears it would permit the status of the subject matter to be changed so as to render subsequent proceedings in the cause ineffectual with reference to the main objects of the suit, or otherwise would result in undue harm or irreparable injury. See Hathaway v. Munroe, 97 Fla. 28, 119 So. 149.
>
> "In this case, the right of the appellant City of Miami Beach to have a stay of the order appealed from was not a matter of discretion in the trial court, since the city's appeal operated automatically as a stay, under §59.14(1) Fla. Stat., F.S.A., which provides that such an appeal shall 'stay the execution or performance of the judgment, decree, or order appealed from.' Rule 5.12(1) F.A.R. contains similar language. However, in view of what is said above in the preceding paragraph of this opinion, on consideration of the circumstances of this case we are not in-

clined to exercise here our jurisdiction to issue an extraordinary writ to expressly authorize the city to act in contravention of the injunction order pending its appeal therefrom." *Id.* at 349-50.

In *Hathway* v. *Munroe,* 119 So. 149, 150 (Fla. 1929), the Florida Supreme Court stated that where ". . . a supersedeas would in effect deny the main relief sought before a full hearing is had . . .," the supersedeas should be denied.

That is precisely what has occurred here: Without benefit of a decision on the merits, appellee's rights have been abrogated by the effect of the Town's action taken during the pendency of a supersedeas automatically granted to the Town without any benefit of a hearing wherein appellee could oppose the supersedeas. Litigants in appeals not involving governmental agencies are regularly accorded that right in the courts of Florida.* If this Court is correct in its interpretation of the terms of the Rule 5.12 supersedeas, then a serious question is raised concerning the constitutional validity of that Rule both as a matter of Due Process and Equal Protection. These issues are especially troublesome in light of the Florida rule that, once a general supersedeas is granted, a litigant has no right, until the supersedeas is terminated, to protect his rights under the superseded decree. *Powell* v. *Florida Land & Improvement Co.,* 26 So. 700 (1899).

Accordingly, this Court should interpret the Rule 5.12 Supersedeas, like the *Cuban Vill-age* Court, to suspend only the affirmative portion of the Final Decree; to leave

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* Where such litigants show that the effect of the supersedeas would be to permit the unsuccessful party to do the things enjoined by the final decree, that alone is sufficient to warrant denial of the supersedeas. *Powell* v. *Florida Land & Improvement Co.,* 26 So. 700 (1899); *Hathway* v. *Munroe, supra,* 119 So. at 150.

in effect the prohibition against the adoption of any zoning classification more restrictive than R-D under Ordinance 3-70 with respect to appellee's properties; and to preserve the rights of both parties to the status quo. Any other interpretation is both fundamentally unjust and constitutionally suspect.

ADDITIONAL SUGGESTION TO CERTIFY DECISION TO THE SUPREME COURT

Subject to the petition for rehearing filed herewith, and on the basis of the foregoing authorities and arguments, the plaintiff-appellee respectfully suggests the following additional questions for certification to the Florida Supreme Court:

5. Does a supersedeas issued pursuant to Rule 5.12, F.A.R., stay all portions of the Final Decree or only those portions necessary to maintain the status quo pending appeal?

6. If Rule 5.12, F.A.R. operates to permit a municipality to defeat the rights of a successful litigant by taking actions contrary to the Final Decree during the pendency of an appeal, is Rule 5.12 F.A.R. unconstitutional under the United States and Florida Constitutions as denying such litigant due process and equal protection?

Respectfully submitted,

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APPENDIX H

EXCERPT FROM PETITIONER'S "PETITION FOR A WRIT OF CERTIORARI" IN THE FLORIDA SUPREME COURT

"10. For the reasons stated in the foregoing paragraphs, the decision of the District Court is in direct conflict with this Court's order promulgating Rule 5.12, Florida Appellate Rules. *In re Florida Appellate Rules,* 139 So.2d 139 (Fla. 1962). It must be presumed that that order was not intended to promulgate an unconstitutional rule and, as more fully discussed in petitioner's brief, the decision of the District Court, by construing Rule 5.12 to permit petitioner's rights to be defeated without benefit of a hearing or a final judicial determination, places an unconstitutional interpretation on that Rule."

EXCERPT FROM PETITIONER'S "BRIEF IN SUPPORT OF CERTIORARI" IN FLORIDA SUPREME COURT

"Denial of the main relief sought is precisely what the District Court's decision permits. There has been no decision on the merits in this appeal. Nevertheless, Petitioner's rights, as adjudicated by the trial court, have been abrogated by the effect of the Town's action taken during the pendency of an automatic supersedeas granted without there having been any opportunity for a hearing in which Petitioner could oppose the supersedeas. Litigants in appeals not involving governmental agencies are

regularly accorded that right in the courts of Florida.* By placing litigants who challenge municipal ordinances in this uniquely disadvantageous position, the District Court's interpretation of the terms of the Rule 5.12 supersedeas raises a serious question concerning the constitutional validity of that rule both as a matter of due process and equal protection. These issues are especially troublesome in light of the well-established Florida rule that, once a general supersedeas is granted, a litigant has no right, until the supersedeas is terminated, to protect his rights under the superseded decree. *Powell* v. *Florida Land & Improvement Co.*, 26 So. 700 (1899). In addition, the consequences of the District Court's decision suggest a denial of basic due process because it permits a municipality, through rezoning after a judgment at trial, to prevent a litigant from ever obtaining a final judicial determination of its rights in a zoning dispute.

"The unconstitutional effect of the District Court's interpretation of Rule 5.12 (and, incidentally the soundness of this Court's position in *Trebor* and *Lelekis* discussed under point IV-A, *supra*) is painfully apparent from a consideration of the inevitable consequences of the Fourth District's decision. It is now more than four years since the Respondent Town rezoned the Petitioner's property. During all that time, although Petitioner's tax burden has gone on, the marketability and usability of its land has been frozen by the pendency of this litigation. Petitioner sought and secured a final judgment designed to finally

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* Where such litigants show that the effect of the supersedeas would be to permit the unsuccessful party to do the things enjoined by the final decree, that alone is sufficient to warrant the denial of the supersedeas. *Powell* v. *Florida Land & Improvement Co.*, 26 So. 700 (1899); *Hathway* v. *Munroe, supra*, 119 So. at 150.

settle its rights. The Town, however, embarked on an end run around Petitioner's rights by the adoption of Ordinance 2-74.

"The decision of the District Court sanctions the Town's ploy and deprives Petitioner of a final judicial determination of its rights. The Court has remanded Petitioner to the trial court, there to again prove what has already been judicially decreed—that any zoning of its property more restrictive than R-D under Ordinance 3-70 is unconstitutional.

"A successful attack upon the constitutionality of a zoning ordinance is rarely the result of a superficial effort. In the instant case the trial court noted that, "Plaintiff has made a vigorous attack upon the entire Comprehensive Plan and Ordinance with a very impressive array of expert witnesses." Such an assault upon the Comprehensive Plan and Ordinance, inevitably involving protracted litigation, cannot be, and was not, mounted without the expenditure of impressive amounts of time and money. Now the District Court invites Petitioner to mount that effort once again. But to what end? Should the Petitioner again prevail, it can hardly be doubted that its success will be met by yet another appeal by the Town, yet another Rule 5.12 supersedeas upon which the Town will rely to deny Petitioner any relief during the pendency of the appeal and, finally, the adoption of yet another new zoning ordinance despite the Rule 5.12 supersedeas.

"The repeated litigation that is all but certain to ensue unless the merits of this dispute are finally decided would impose an unwarranted burden of time and expense upon both the judicial system and the parties. The death knell of appellate recourse in such cases might well be sounded

if this Court permits a decision to stand which requires Petitioner to repeat the costly trial procedure, in the face of the sure knowledge that the prospective enactment of a Zoning Ordinance 2-75 or 2-76 might well result in another, and then yet another, round of litigation, serving no end save the exhaustion of its financial resources.

"The consequences of accepting the District Court's view would be that local governments would be encouraged to believe that they could prevail in zoning litigation by exhausting the plaintiff before the plaintiff could exhaust its remedies. The slow attrition of the plaintiff's rights would make a travesty of the judicial process and compels the conclusion that an interpretation of Rule 5.12 which permits such a result is patently unconstitutional. That unconstitutionality places the decision of the District Court in direct conflict with the order of this Court promulgating Rule 5.12, F.A.R., *In re Florida Appellate Rules,* 139 So. 2d 139 (Fla. 1962), which must be presumed to have established a rule not in conflict with the basic constitutional rights of litigants.

"For the foregoing reasons, the Petitioner submits that the decision of the District Court is erroneous and that the *Cuban Vill-age* and *Lansburgh* decisions are correct in interpreting Rule 5.12 so as to suspend only the affirmative portion of the final judgment; to leave in effect the prohibition against the adoption of any zoning classification more restrictive than R-D under Ordinance 3-70 with respect to Petitioner's properties; and, to preserve the rights of both parties to the status quo. Any other interpretation is both fundamentally unjust and unconstitutional." [Brief, pp. 13-17]

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-149

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known as Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to petitioner's application for a writ of certiorari to the Fourth District Court of Appeal of Florida in which review is sought of the district court's holding that petitioner's challenge to the Town's zoning ordinance, as applied to petitioner's property, must be decided in light of a new comprehensive zoning ordinance enacted by the Town of Palm Beach to replace a prior ordinance held by the Supreme Court of Florida to be void from its inception.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of Florida is reported at 298 So.2d 443 and is printed in the Appendix to the Petition for Writ of Certiorari (App. 1a).*

* (App. ____) refers to the Appendix to the Petition for Writ of Certiorari filed herein by petitioner.

That decision incorporates by reference that Court's opinion in *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.*, reported at 298 So.2d 439, and printed at (App. 3a). The order of the district court denying petitioner's application for rehearing is not reported and is printed at (App. 10a). The order of the Florida Supreme Court declining to review the decision of the Fourth District Court of Appeal is reported at 311 So.2d 113 and is printed at (App. 11a). The order of the Florida Supreme Court denying petitioner's application for rehearing is not reported and is printed at (App. 12a).

JURISDICTION

Petitioner asks this Court to assert its jurisdiction pursuant to 28 U.S.C. § 1257(3). That provision confers discretionary jurisdiction upon this Court to review state court decisions

> ". . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner's jurisdictional claims are defective because petitioner failed to properly and timely raise the federal question in the state proceedings below (see Point I, *infra*), and because no decision was rendered by the highest state court (see Point II, *infra*).

QUESTIONS PRESENTED

I. Whether the petition for certiorari must be denied because of petitioner's failure to properly and timely raise the federal question in the state court proceedings.

II. Whether the petition for certiorari must be denied because no decision was rendered by the highest state court as a result of petitioner's failure to follow Florida procedure.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the District Court of Appeal, Fourth District, State of Florida, reversing and remanding this zoning case, and companion cases, for further proceedings in light of a new comprehensive zoning ordinance enacted by the Town of Palm Beach to replace a prior ordinance held by the Supreme Court of Florida to be void from its inception.

Proceedings in the Trial Court

Petitioner and various other property owners in the Town of Palm Beach filed suits in the Circuit Court of Palm Beach County challenging the constitutional validity of the Town's zoning Ordinance 3-70 as applied to their properties, and contending that the ordinance was void because it was enacted in violation of the Florida Government in the Sunshine Law (Fla. Stat. §286.011). The trial judge severed the sunshine issue from other issues in these cases and consolidated the case for trial of that single issue. Following trial, he upheld the Town's position that the ordinance was not enacted in violation of the Sunshine Law. An interlocutory appeal of that decision was taken by one property owner, IDS Properties, Inc. Petitioner and the remaining property owners pro-

ceeded to trial on the constitutionality of Ordinance 3-70 as applied to their particular parcels and the trial judge held the ordinance to be arbitrary and unreasonable as applied to petitioner's property.

Proceedings in the Florida District Court and Florida Supreme Court

The Town appealed from that decision and petitioner cross-appealed on the sunshine issue. The Town's appeal automatically stayed execution of the judgment below in accordance with the provisions of Florida Appellate Rule 5.12, which provides for stay during review of an appeal by the state or any of its political subdivisions, unless the court "on motion for good cause shown" requires a supersedeas bond or other security or condition. Petitioner made no motion for a bond or other security nor did petitioner challenge the Rule by cross-appeal.

Petitioner's cross-appeal on the sunshine issue was consolidated with the previously filed interlocutory appeal on the sunshine issue, and on May 30, 1973, while the appeal from the decision on the merits was still pending in the district court, the district court entered its opinion holding Ordinance 3-70 to be "void in toto" for violation of the Sunshine Law. *IDS Properties, Inc.* v. *Town of Palm Beach* (Fla. App. 4th Dist. 1973), 279 So.2d 353. The district court's decision was certified to the Florida Supreme Court as passing upon a question of great public interest. While the petition on the sunshine question was pending before the Florida Supreme Court, the Town proceeded with new zoning hearings and the enactment of a new comprehensive zoning ordinance to fill the void that would be left should the district court's ruling as to the invalidity of Ordinance 3-70 be ultimately

sustained. On March 26, 1974 Zoning Ordinance 2-74 was enacted, substantially altering the zoning classifications set forth in Ordinance 3-70. On May 1, 1974 the Supreme Court of Florida handed down its opinion affirming the decision of the district court on the sunshine issue and finding Ordinance 3-70 to be "void *ab initio.*" *Town of Palm Beach* v. *Gradison* (Fla. 1974), 296 So.2d 473, 477.

The district court promptly invited counsel to submit briefs discussing the impact of the Florida Supreme Court's decision on the sunshine issue, and after consideration of those briefs, the district court on July 19, 1974 entered its opinion in the instant and companion cases. *Town of Palm Beach* v. *First Bank and Trust Co. of Boca Raton* (Fla. App. 4th Dist. 1974), 298 So.2d 443, *cert. denied* (Fla. 1975), 311 So.2d 113; *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.* (Fla. App. 4th Dist. 1974), 298 So.2d 439; and *Town of Palm Beach* v. *Gradison* (Fla. App. 4th Dist. 1974), 298 So.2d 443, *cert. denied* (Fla. 1974), 307 So.2d 448.

The district court found that it was required to decide the case according to the law in effect at the time of the appellate disposition:

> "We are obliged to determine the current appeal in the light of current law. Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); Ingerson v. State Farm Mutual Automobile Ins. Co., 272 So.2d 862 (3d D.C.A. Fla. 1973); Van Meter v. Murphy, 287 So.2d 740 (1st D.C.A. Fla. 1973); Northeast Polk County Hosp. District v. Snively, 162 So.2d 657 (Fla. 1964); *See* Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 212, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); Fla. East Coast Ry. Co. v. Rouse, 194 So.2d 260 (Fla. 1967)." (298 So.2d 441)

The court further found that Ordinance 3-70 had been held void as a result of petitioner's efforts and that the enactment of the new ordinance was not occasioned by any wrongful design by the Town to circumvent the judicial process or take undue advantage of petitioner:

> "Next, we observe that the action of the courts in erasing Ordinance No. 3-70 from the records was consistent with the efforts of the Plaintiff and contra to the wishes of the Town. The Town defended and sought to uphold its ordinance throughout. Thus, the action of the Town in enacting its current ordinance, No. 2-74, to fill the void was the consequence, at least as to the Town, of unforeseen and unwanted judicial action. It was in nowise occasioned by any wrongful design or effort on the part of the Town to leapfrog or circumvent the judicial process and take advantage of the Plaintiff." (398 So.2d at 441)

Finally, the district court found that to attempt to apply the circuit court's finding to a new ordinance with new and different classifications not previously considered by the trial judge would be impossible:

> "Finally, we have re-examined and re-studied the appealed judgment in view of what we have said. Plainly, if we scissor out all reference to the void ordinance and its classifications, the findings and decision under review are meaningless. Further, neither the Town, nor we, could appropriately administer that judgment in the future except by ignoring the fact that Ordinance No. 3-70 has been declared illegal and void ab initio, and by ignoring the fact that at a later point in time the Plaintiff's lots and all other neighboring lands have been re-zoned, using new and different

classifications and considering changed conditions. And so, even if we were to adopt the Plaintiff's suggestion earlier mentioned, it would create an awkward and unfair situation. It likely would not be harmonious with the plan of the new ordinance and the new zoning assigned to neighboring lands. Zoning cannot be accomplished in a vacuum on a spot or lot by lot basis without regard to neighboring properties and a proper over-all plan and basic program. There must be correlation and harmony according to basic planning and zoning principles. F.S. 163.190 (1973).

"It may be repetitious to remark, but it bears repeating, that we cannot take an old adjudication; using void, old and different criteria, and necessarily fit it into a viable, new and different zoning scheme. --It might fit, but it might not, and surely the trial court should have an opportunity to measure in the interest of those affected." (298 So.2d at 441-42)

The district court thus reversed and remanded the cause for reconsideration by the trial judge in light of current Zoning Ordinance 2-74:

"We hold that the adjudication and appealed judgment are moot. Therefore, we rest our holding and appellate decision upon the authority of Lelekis v. Liles, 240 So.2d 478 (Fla. 1970). . . .

"We reverse and remand with respectful instructions that the parties be allowed to amend their pleadings as they are advised within a reasonable length of time to be set by the trial court in its discretion. Such amendment shall be in the interest of making issues as to zoning of Plaintiff's lots under the current zoning ordinance, No. 2-74." (298 So.2d at 442)

Petitioner's Belated and Ineffectual Attempt to Raise the Federal Question

Petitioner filed, within the time provided by the Florida Appellate Rules, a petition for rehearing requesting the district court to reconsider its holding. That petition for rehearing did *not* seek to raise the federal questions sought to be reviewed by the petition for certiorari herein. While the petition was pending, petitioner filed a motion for leave to supplement the petition for rehearing by suggesting, for the first time, that the district court's opinion "raises grave issues concerning the constitutional rights of litigants subject to the automatic supersedeas applicable in cases where the appellant is a municipality, Rule 5.12, F.A.R., 32 F.S.A." (App. 43a) Respondent opposed the motion upon the grounds that it was not timely and that it sought to raise new grounds not previously presented. The District Court of Appeal denied the original petition for rehearing without permitting filing of petitioner's supplement.

Petitioner then filed a petition for writ of certiorari in the Supreme Court of Florida asserting jurisdiction based on an alleged conflict between the decision of the district court and prior Florida decisions. In that petition petitioner again failed to challenge the constitutional validity of Rule 5.12, Florida Appellate Rules, but rather contended merely that the decision of the district court was "in direct conflict with [the Florida Supreme] Court's order promulgating Rule 5.12, Florida Appellate Rules. *In re Florida Appellate Rules*, 139 So.2d 139 (Fla. 1962)." (App. 49a) The Supreme Court of Florida unanimously denied petitioner's petition for writ of certiorari without opinion (App. 11a), and likewise denied the petition for rehearing (App. 12a).

ARGUMENT

The judgment which petitioner seeks to have this Court reinstate was set aside as the result of petitioner's successful effort to have the ordinance under which the trial court's decision was rendered declared void because of violations of the Florida's Government in the Sunshine Law. As a result, the state appellate court has ruled petitioner's property must be reexamined in light of the newly enacted zoning ordinance inasmuch as that court, like this one *[See Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.* (1972), 404 U.S. 212], recognized that it must apply the law in effect at the time of the appellate disposition of the case, not the law in effect at the time of the trial court's decision. Petitioner, belatedly seeks to challenge Florida Appellate Rule 5.12 which had no effect on the outcome below, in an attempt to secure in this forum a result it was unable to obtain in the proper state forum. That Rules provides:

> "(1) When Security Not Required.—When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of the notice of appeal or the petition for certiorari as the case may be shall perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court.
>
> "(2) Court May Require Bond.—The court may, on motion for good cause shown, require a supersedeas bond or other security, in such amount, form and manner as it may prescribe as a condition for the further prosecution of the appeal or certiorari." (Fla. App. R. 5.12)

I.

Petitioner Failed to Properly and Timely Raise the Federal Question in the State Court Proceedings.

An essential requirement of 28 U.S.C. §1257(3) under which petitioner seeks to have this Court invoke its jurisdiction, is that a substantial federal question has been properly raised in the state court proceedings. Stern and Gressman, *Supreme Court Practice* §3.25 (4th ed. 1969); Rule 23, Supreme Court Rules.

Failure to "Draw in Question" the State Statute

At no stage in the state proceedings did petitioner directly and clearly challenge Florida Appellate Rule 5.12 as violative of any federal constitutional provision. In its "Supplement to Appellee's Petition for Rehearing" (which was never permitted by the court to be filed), petitioner simply suggested that the court's opinion "raises grave issues concerning the constitutional rights of litigants" (App. 43a); and in its petition for certiorari to the Florida Supreme Court (which was denied without hearing on the basis of lack of conflict jurisdiction, App. 11a), petitioner merely contended that

> "the decision of the District Court, by construing Rule 5.12 to permit petitioner's rights to be defeated without benefit of a hearing or a final judicial determination, places an unconstitutional interpretation on that Rule." (App. 49a)

Section 1257(3), upon which petitioner relies, explicitly requires that the validity of a state statute must have been "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . ." (28 U.S.C. §1257) in order for this Court to have jurisdiction.

As stated in *Oxley Stave Co.* v. *Butler County* (1897), 166 U.S. 648, 655:

> "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

Here there was no distinct or clear averment sufficient to "draw in question" the validity of Rule 5.12 based on the federal constitution. Indeed it is not clear from the pleadings below whether petitioner was asserting violation of its due process and equal protection rights under the federal *or the state* constitution.

As this Court stated in *New York Central & H. R. Co.* v. *New York* (1902), 186 U.S. 269, 273:

> "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

Absent a clear reference, it will be assumed that a state statute is being challenged on state constitutional rather than federal constitutional grounds. *New York ex rel. Bryant* v. *Zimmerman* (1928), 278 U.S. 63, 67-8.

Petitioner contends that Rule 5.12 "accords special rights to municipalities . . . not accorded to other parties" inasmuch as "[n]o supersedeas bond need be given by the municipalities unless it is expressly required by the court on *motion of the appellee* for good cause shown." (Petition for Certiorari at 19-20, emphasis added.) We submit that the classification established by this Rule, which is based on the presumption

that the state and its political subdivisions are financially responsible, is a constitutionally valid classification. In any event, petitioner, by failing to either move the court to require a supersedeas or other condition of the appeal, or to directly challenge the Rule in the Florida courts, has waived its right to raise the question in this Court.

Failure to Timely Raise the Federal Question

Petitioner failed to present *any* challenge to Rule 5.12 until after the time for filing a petition for rehearing in the district court had expired. The Florida Appellate Rules permit the filing of only one petition and such petition must be filed within fifteen days after the filing of the decision or order of the court. (Fla. App. R. 3.14) An additional petition not filed within that period will not be considered by the court. *Cali* v. *State* (Fla. App. 2d Dist. 1959), 111 So.2d 703, 707.

Here petitioner first made mention of Rule 5.12 in a "Supplement to Appellee's Petition for Rehearing" attached to a motion for leave to file such paper, filed after the time provided by the Rule for filing a petition for rehearing. Respondent objected and the district court denied "appellee's August 2, 1974 Petition for Rehearing" (App. 10a) without opinion and without permitting the filing of the paper upon which petitioner now bases its claim that a proper federal challenge was presented. Raising a federal question for the first time even in a *timely* petition for rehearing is generally deemed too late unless the state court expressly decides the question. *Radio Station WOW* v. *Johnson* (1945), 326 U.S. 120, 128; *Hanson* v. *Denckla* (1958), 357 U.S. 235, 243-44. Here the question was neither timely presented nor expressly decided by the state court.

The principal authority relied upon by petitioner is this Court's decision in *Brinkerhoff-Faris Co.* v. *Hill* (1930), 281

U.S. 673. In that case the Missouri Supreme Court, overruling earlier decisions which had established procedures for challenging a tax law, established new procedures and held that the plaintiff was bound by the new procedures. Petitioner filed a timely petition for rehearing challenging the action, and upon the refusal of the state court to consider his argument, this Court granted certiorari, stating that "the additional federal claim thus made was timely, since it was raised at the first opportunity." (281 U.S. at 678) Here, unlike the petitioner in that case, petitioner did not raise the constitutional challenge at the "first opportunity," but so delayed making the challenge as to preclude review by the Florida courts. Petitioner made no application for a supersedeas or other condition in accordance with the provision of Rule 5.12; made no cross-assignment of error as to this issue on appeal; and finally, raised the issue only obliquely after the time for filing a petition for rehearing to the district court had expired. There was no change in procedure or rule of law. The automatic stay provision of Rule 5.12 has been in effect more than thirty years (see Chapter 19172, Laws of Florida 1939); and the rule of law upon which the district court based its decision is well recognized and followed in the Florida courts. [*E.g.*, *Goodfriend* v. *Druck* (Fla. 1974), 289 So.2d 710; *Ingerson* v. *State Farm Mutual Automobile Ins. Co.* (Fla. App. 3d Dist. 1973), 272 So.2d 862; *Van Meter* v. *Murphy* (Fla. App. 1st Dist. 1973), 287 So.2d 740; *Northeast Polk County Hosp. Dist.* v. *Snively* (Fla. 1964), 162 So.2d 657; and *Florida East Coast Ry.* v. *Rouse* (Fla. 1967), 194 So.2d 260.]

The district court denied the petition for rehearing without reaching, or even considering, petitioner's suggestion that its opinion, remanding the case for reconsideration in light of existing law, raised "grave issues concerning the constitutional

rights of litigants" (App. 43a). Then having no decision "initially and directly passing on the validity of a state statute" so as to permit an appeal to the Florida Supreme Court [Fla. Const. art. V, §3(b)(1)], petitioner sought review by conflict certiorari asserting that the district court's construction "places an unconstitutional interpretation on that Rule" (App. 49a). The Florida Supreme Court denied certiorari without reaching petitioner's belated challenge to Florida Appellate Rule 5.12.

II.

No Decision Was Rendered by the Highest State Court Because of Petitioner's Failure to Follow Florida Procedure.

Essential to the exercise of this Court's jurisdiction under §1257(3) is that a substantial federal question was raised and decided by the highest state court. As Mr. Justice Frankfurter noted:

> "ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' [Citation omitted.] This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson* (1945), 326 U.S. 120, 124.

Where it is not clear from the record that the federal question was necessarily decided by the highest state court, petitioner is called upon to demonstrate that a federal question was properly and timely raised and "was decided as a

necessary ground for reaching the judgment under review." *Herb* v. *Pitcairn* (1945), 324 U.S. 117, 128.

Under the Florida Constitution, the Supreme Court of Florida is empowered to hear, by appeal, decisions passing "on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution." Fla. Const. art V, §3(b)(1). Here petitioner failed to timely raise the constitutional challenge according to rules of Florida procedure and, as a result, neither the state's highest court, nor any other court, decided the question sought to be presented here. And petitioner has made no attempt by certificate [*See* Stern and Gressman, *Supreme Court Practice* §3.29 (4th ed. 1969)] or otherwise, to demonstrate that the federal issue was ever decided.

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street* v. *New York* (1959), 394 U.S. 576, 582.

Analagous is *Stembridge v. Georgia* (1952), 343 U.S. 541. There petitioner sought to raise the question of his federal constitutional rights for the first time in a *timely* motion for rehearing in the state court of appeals. This Court, recognizing that the Supreme Court of Georgia was the "highest court of the state in which a decision could be had in this case," and that the Georgia court could have "denied certiorari on adequate state grounds' (343 U.S. at 546-47), held that the action of the highest state court in refusing, without opinion, to hear the case precluded review by certiorari.

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." (343 U.S. at 547)

Likewise here, petitioner's failure to follow proper state procedure precluded an appeal to Florida's highest court. Petitioner therefore sought review by certiorari based upon an alleged conflict between the decision of the district court and "a decision of another district court of appeal or of the Supreme Court on the same point of law" Fla. App. R. 4.5c (6). The Florida Supreme Court found no conflict and denied the petition on that ground (App. 11a). It is well established that in making its decision as to whether it has conflict jurisdiction, the Florida Supreme Court does not even consider the merits of the controversy, and its decision denying certiorari can be taken to mean no more than that the case is distinguishable in controlling factual elements or in points of law from the case or cases upon which conflict is asserted. *Kyle* v. *Kyle* (Fla. 1962), 139 So.2d 885, 887.

Providing the highest court of the state does not close its door to any consideration of a claim alleging denial of a federal right, this Court will respect the state's procedure, and where the petitioner fails to follow that procedure he will be deemed to have waived the federal issue. *Young v. Ragan* (1949), 337 U.S. 235, 238; *Herndon v. State of Georgia* (1935), 295 U.S. 441, 443. As stated by Mr. Justice Holmes:

> "when as here there can be no pretense that the [state court] adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel v. Cole* (1921), 256 U.S. 222, 225.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, air mail postage prepaid, to Richard F. Babcock, Esquire, Suite 3100, One IBM Plaza, Chicago, Illinois 60611, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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No. 75-149

In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

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SORG/CHICAGO U.S.A.

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PETITIONER'S REPLY BRIEF

The thrust of respondents' Brief in Opposition is that petitioner's Petition for a Writ of Certiorari should be denied on procedural grounds. Petitioner's attempt to raise the federal question in the proceedings below is characterized as "[b]elated and [i]neffectual." (Resp. Br. p. 8) * As respondents have devoted almost no atten-

* "Resp. Br." refers to respondents' Brief in Opposition. "Pet. App." refers to petitioner's Appendix to its Petition for a Writ of Certiorari.

tion to the important substantive issues of the case, this Reply Brief will be limited to refuting respondents' procedural arguments.

I.

Respondents' repeated assertion that the Florida District Court of Appeal did not permit the filing of petitioner's supplement to its original petition for rehearing, wherein the constitutional issues were first raised, is not reflected in any order that was entered by the District Court of Appeal. There was, in fact, no order entered in connection with the petition for rehearing denying leave to file the supplement to the petition and it must be presumed that the District Court considered the supplement along with the original petition, which was timely filed.

II.

However, even assuming *arguendo* that the supplement was not timely filed, it does not follow, as respondents argue, that petitioner thereby waived its right to an adjudication of the federal question.

Respondents seek to apply the holding of *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930), to the instant case. (Resp. Br. pp. 12-13) The Court in *Hill* held that the raising of a federal question for the first time on a petition for rehearing to the Missouri Supreme Court was timely, since it was made at the first opportunity, owing to the fact that it was the very decision of the Missouri court which gave rise to a violation of the Due Process Clause. In *Hill* there was no way, short of a petition for rehearing, for the aggrieved party to pursue a remedy for this violation in the state court system. What respondents overlook in their arguments concerning the petition for

rehearing in the District Court of Appeal is that the petition was neither an exclusive nor a necessary remedy under Florida law. In addition to it petitioner had, and utilized, the opportunity to seek review of the District Court decision in the Florida Supreme Court. Neither the Florida Constitution nor the Florida Appellate Rules make the filing of a petition for rehearing in the District Court a prerequisite for seeking review in the Supreme Court.

In fact, in the Florida courts, respondents took the position that the petition for rehearing was not a proper vehicle to raise the constitutional issue, since that issue involved "new grounds not previously presented." (Resp. Br. p. 8) Ironically, respondents now urge this Court dismiss the petition for certiorari because these "new grounds" were not first presented in a timely petition for rehearing!

III.

Respondents' claim that petitioner did not raise the federal constitutional issue in the Florida Supreme Court is a misstatement of the record. Petitioner's theory in the Florida Supreme Court was that the District Court's decision was in direct conflict with the Supreme Court's order promulgating Florida Appellate Rule 5.12. The Supreme Court is presumed to have promulgated a constitutionally valid rule. Petitioner specifically argued that "the decision of the District Court, by construing Rule 5.12 to permit petitioner's right to be defeated without benefit of a hearing or a final judicial determination, places an unconstitutional interpretation on that Rule." (Pet. App. p. 49a) Petitioner's Brief in Support of Certiorari discussed in detail the grounds of unconstitutionality. (Pet. App. pp. 42a-52a) The phrasing of the issue in terms of conflict, thereby invoking the certiorari jurisdiction of the Supreme

Court under Article V, §3(b)(3) of the Florida Constitution, was the only means to present the constitutional issue to that court. The appeal remedy under Article V, §3(b)(1), suggested by respondents (Resp. Br. p. 15), was not available, since the District Court of Appeal did not "directly" pass on the validity of Rule 5.12 as required by §3(b)(1).

IV.

Respondents further assert that it is not clear from the pleadings below "whether petitioner was asserting violation of its due process and equal protection rights under the federal *or the state* constitution." Respondents' assertion is plainly incorrect, as petitioner invoked both the state *and* the federal constitutions in paragraph 6 of its Additional Suggestion to Certify Decision to the Supreme Court, submitted along with its Supplement to Petition for Rehearing filed in the Florida District Court of Appeal (Pet. App. p. 48a):

> "6. If Rule 5.12, F.A.R. operates to permit a municipality to defeat the rights of a successful litigant by taking actions contrary to the Final Decree during the pendency of an appeal, is Rule 5.12 F.A.R. unconstitutional under United States and Florida Constitutions as denying such litigant due process and equal protection?"

This paragraph meets the requirements of *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63 (1928), upon which the respondents rely. There, the Court stated at p. 67:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

CONCLUSION

For the reasons stated herein, in addition to the reasons set forth in its Petition for a Writ of Certiorari, petitioner prays that said Petition be granted.

Respectfully submitted,

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